

(25,256)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 460,

ALICE STATE BANK ET AL., PETITIONERS,

vs.

HOUSTON PASTURE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

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1 UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

ALICE STATE BANK et als., Plaintiffs in Error,
versus
HOUSTON PASTURE COMPANY, Defendant in Error.

Pleas and Proceedings had and done at a regular term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in November, A. D. 1915, at Fort Worth, Texas, before the Honorable Don A. Pardee and the Honorable Richard W. Walker, Circuit Judges, and the Honorable Emory Speer, District Judge.

Be it remembered, that heretofore, to-wit, on the 20th day of August, A. D. 1915, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the United States for the Southern District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2823, as follows:

2 TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals for the Fifth Circuit.

No. 2823. Law.

ALICE STATE BANK et als., Plaintiffs in Error,
versus

• HOUSTON PASTURE COMPANY, Defendant in Error.

Writ of Error from the United States District Court, Southern District of Texas, Corpus Christi Division.

U. S. Circuit Court of Appeals. Filed Aug. 20, 1915. Frank H. Mortimer, Clerk.

3 In the District Court of the United States for the Southern District of Texas, in the Fifth Circuit, Holding Sessions at Corpus Christi.

D. L., No. 8.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

Be it remembered, That in the above entitled and numbered cause, lately pending in said Court, in which final judgment was

rendered at the regular May Term of said Court, 1915, to-wit: On the 28th day of May, A. D. 1915, the Hon. Waller T. Burns, Judge of the District Court of the United States for the Southern District of Texas presiding, the following proceedings were had and taken in said Court, to-wit:

4 *Plaintiff's First Amended Original Petition.*

Filed Nov. 7, 1914.

In the United States District Court for the Southern District of Texas, at Corpus Christi.

D. L., No. 8.

THE HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et al.

To the Honorable Waller T. Burns, Judge of said Court:

Now comes the plaintiff, in vacation, and files this its first amended original petition in lieu of its original petition filed herein; and thereupon plaintiff so amending, pleads as follows, to-wit:

Now comes the Houston Pasture Company, a corporation, duly organized and incorporated under and by virtue of the laws of the State of Louisiana, with its domicile at Benton Bossier Parish, Louisiana, hereinafter called plaintiff, and complaining of the Alice State Bank, A. A. Harrell, John A. Harrell, D. W. Martin, W. J. Gibson T. N. Pullin, W. E. Schmalstieg, Alfred Sivers, Frank J. Widergren, John A. Anderson, William Truax, J. P. McDowell, Martha H. McDowell, H. McDowell, C. L. Vickers, W. M. Speasard, J. A. Harrell, and the Coleman-Fulton Pasture Company, hereinafter styled defendants, and for cause of complaint, plaintiff shows to the Court as follows:

Plaintiff is a corporation, duly incorporated under and by virtue of the laws of the State of Louisiana, with its domicile at Benton, Bossier Parish in said State; that the defendants, The Alice State Bank is a private corporation, duly and legally incorporated, under and by virtue of the laws of the State of Texas, with its
5 principal office and place of business in the city of Alice, Jim Wells County, Texas, with P. A. Preenall, President, and T. H. Clark as its Cashier; that John A. Anderson, Frank L. Widergren and Alfred Sivers, are resident citizens of Madison County, in the state of Nebraska; that Martha McDowell and J. P. McDowell are resident citizens of Bee County, Texas; that John A. Harrell is a resident citizen of Johnson County, Texas; that W. D. Martin and William Truax are resident citizens of Buchanan County, Iowa; that J. A. Harrell is a resident citizen of Kleburg County; that W. E. Schmalstieg, W. M. Speasard, C. L. Vickers, W.

J. Gibson and A. A. Harrell are resident citizens of San Patricio County, Texas; and that T. N. Pullin is a resident citizen of Karnes County, Texas; the defendant Coleman-Fulton Pasture Company is a corporation duly and legally incorporated under the laws of the State of Texas, and has its principal office and place of business in San Patricio County, Texas, where it is represented by its officers and agent, upon whom service may be had; that the defendants have their domiciles in the States and Counties respectively as hereinbefore indicated.

That the subject matter of this suit, to-wit, 1280 acres of land lying in San Patricio County, Texas, is of the value far in excess of Three Thousand (\$3,000.00) Dollars.

Wherefore, from the diversity of citizenship of the parties and the amount in controversy in this suit, this Honorable Court has jurisdiction to hear and determine this cause.

And for cause of complaint, plaintiff shows to the Court that heretofore, to-wit, on the 20th day of May, A. D. 1914, plaintiff was lawfully seized and possessed of the land hereinafter described by title in fee simple, and that on said date the defendants unlawfully entered upon said premises and ejected the plaintiff therefrom, and have continued to unlawfully withhold from the plaintiff the possession of said premises to its damage in the sum of Five Thousand (\$5,000.00) Dollars; that the said rental value of said land is the sum of Three Thousand (\$3,840.00) Eight Hundred and Forty Dollars per year, on a basis of Three (\$3.00) Dollars per acre per year.

The land hereinbefore referred to, is described as follows, to-wit:

That certain tract of 1280 acres of land in San Patricio County, Texas, patented to the heirs of General Sam Houston, by Patent No. 566, Vol. 14, dated June 22nd, 1874, and known as Abstract No. 165, in the State printed abstract book and patented by virtue of Bounty Warrant No. 3894, issued June 20th, 1838, and described by metes and bounds as follows:

Beginning at the N. W. corner of a survey for Chas. F. Delmas, by virtue of Bounty Warrant No. 2869, for the S. W. corner of this survey;

Thence East with said Delmas Survey 950.40 varas to its N. E. corner;

Thence South 88.40 varas to the N. W. corner of League No. 1 of San Patricio County School land;

Thence East with its N. boundary 2727 varas to post for S. E. corner;

Thence North 1088 varas to a post for N. E. corner;

Thence West 3677.90 varas to a post in prairie for N. W. corner;

Thence South 1900.80 varas to the place of beginning.

Wherefore plaintiff prays that the defendants be cited in terms of law, and upon a trial hereof, plaintiff have judgment against the defendants for the title and possession of said land, and judgment for Five Thousand (\$5,000.00) Dollars as damages, or such other sum as damages as the facts may show plaintiff entitled to. Plaintiff

7 also prays for such other and further relief, special and general, as the facts may show it entitled to, whether herein specially prayed for or not, and for costs of suit.

W. D. GORDON,
THOS. J. BATEN,
Attorneys for Plaintiff.

Indorsements: D. L. No. 8, In the U. S. District Court for the Southern District of Texas, at Corpus Christi, Texas. Houston Pasture Company vs. Alice State Bank, et al. Plaintiff's First Amended Original Petition. This action is brought as well to try title as for damages. Filed Nov. 7, 1914. L. C. Masterson, Clerk. By J. A. Mount, Deputy.

Original Answer of the Alice State Bank, of Defendants.

Filed May 25th, 1915.

In the United States District Court for the Southern District of Texas, at Corpus Christi.

D. L., No. 8.

THE HOUSTON PASTURE COMPANY
VS.
ALICE STATE BANK et al.

Now comes the Alice State Bank, of Defendants, by its Attorney, and answering herein, says:—That the Plaintiff's Petition herein, is insufficient in law, and shows no cause of action against this Defendant to compel it to further answer herein, etc.

Wherefore, it prays Judgment, that Plaintiff's said petition be dismissed, and for its costs, &c.

ALICE STATE BANK,
Of Defendants,
By JAMES B. WELLS,
Its Attorney.

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II.

And, not at all waiving, but specially reserving unto itself all benefit of its foregoing General Exception, again comes said Defendant and further Answering herein, says:—That it is not guilty of the wrongs, injuries, trespasses, &c.; as in Plaintiff's Petition is laid to its charge, &c. And of this it puts itself upon the Country, &c.

Wherefore, it prays Judgment, that Plaintiffs take nothing by *their* suit, and that it go hence without day, and recover its costs herein, &c.

ALICE STATE BANK,
Of Defendants,
By JAMES B. WELLS,
Its Attorney.

III.

And, for further Answer herein, this Defendant here now adopts the Answer of the Defendant Coleman, Fulton Pasture Company, filed herein on the 4th day of January, 1914, and here now urges each and every defense therein set up to Plaintiff's cause of action the same as though each and every one of said defenses were here now pleaded.

IV.

In Answer to Plaintiff's First Supplemental Petition this Defendant here now adopts the reply of the Coleman Fulton Pasture Company thereto, and here now urges each and every defense stated in the said reply of the said Coleman Fulton Pasture Company to said Plaintiff's First Supplemental Petition the same as though the same were now here stated.

JAMES B. WELLS,
Attorney for Alice State Bank.

9 Indorsements: D. L. No. 8. Houston Pasture Company vs. Alice State Bank, et al. Original Answer of the Alice State Bank, of Defendants. Filed this the 25th day of May, A. D. 1915. L. C. Masterson, Clerk, U. S. District Court, Southern District of Texas, at Corpus Christi. By J. A. Mount, Deputy.

Original Answer of Defendants Widergren and Anderson.

Filed Jan. 4, 1915.

In the District Court of the United States for the Southern District of Texas, at Corpus Christi, Texas.

No. 8, D. L.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

Now come the defendant, Frank L. Widergren and John A. Anderson, and except generally to the plaintiff's petition, and say that same is insufficient in law, and of this they pray judgment of the court.

2. Now come the defendant, Frank L. Widergren and John A. Anderson, and answering the plaintiff's petition herein, disclaim any right, title or claim in and to the land sued for herein by the plaintiff, and described in its petition, save and except the following portion of said land, to-wit: Situated in San Patricio County, Texas, and being the S. E. $\frac{1}{4}$ of Section 41, of the Geo. H. Paul Company subdivision of the Coleman-Fulton Pasture lands in San Patricio County, Texas, containing 160 acres of land, as shown by map

thereof on file in the office of the County Clerk of San Patricio County, Texas, known as Map of the Geo. H. Paul Company
10 Subdivision of the Coleman-Fulton Pasture Company lands lying south of Taft in San Patricio County, Texas.

Wherefore, these defendants prays that as to all of said land sued for herein by the plaintiff, except the 160 acres last above described, they go hence without day and recover their costs.

J. C. HOUTS,
Attorney for Said Defendants.

3. And for further answer herein these defendants deny all and singular the allegations in the plaintiff's petition contained, and of this they put themselves upon the country and pray judgment of the Court.

3a. Deft. denies in toto the allegations in paragraphs 5, 6 & 7 of plaintiff's petition.

4. Referring to the 160 acres of land last above described, these defendants say they are not guilty of the wrongs, trespasses and injuries complained of in the plaintiff's petition filed herein against them, and of this they put themselves upon the country and pray judgment of the court.

5. And for further plea in this behalf these defendants say that the plaintiff ought not to have and maintain its said cause of action against them, because they say that they and those whose estate they have, and under whom they claim with privity, have had and held actual, peaceable, continuous and adverse possession of said land last above described, and sued for by the plaintiff, under title from and under the sovereignty of the soil for more than three years after the plaintiff's cause of action, if any it ever had, accrued, and before the commencement of this suit, and this they are ready to verify.

Wherefore these defendants plead the three years statute of
11 limitation, and say that the plaintiff's cause of action, if any it ever had, is barred by said three years statute of limitation.

6. These defendants say that they and those whose estate they have, and under whom they claim with privity, have had and held actual, peaceable, continuous and adverse possession of the said 160 acres of land, last above described and sued for by the plaintiff, under color of title from and under the sovereignty of the soil for more than three years after the plaintiff's cause of action, if any it ever had, accrued, and before the commencement of this suit, and this they are ready to verify.

Wherefore these defendants plead the three years statute of limitation, and say that the plaintiff's cause of action, if any it ever had, is barred by the three years statute of limitation.

7. And for further plea in this behalf these defendants say that the plaintiff ought not to have and maintain its said cause of action against them because they say that they, and those whose estate they have, and under whom they claim with privity, claiming the said 160 acres of land last above described, and sued for by the plaintiff herein, have had actual, peaceable, exclusive and adverse possession of the said land, using, cultivating and enjoying the same,

and paying all taxes due thereon for a period of more than five years after the plaintiff's cause of action, if any it ever had, accrued, and before the commencement of this suit.

Wherefore these defendants now plead the five years statute of limitation, and say that the plaintiff's cause of action, if any it ever had, is now barred by the five years statute of limitation.

8. And for further plea in this behalf these defendants say that the plaintiff ought not to have and maintain its aforesaid cause of action against them because they say that they and those
12 whose estate they have, and under whom they claim with privity, claiming to have a good and perfect right and title to the said 160 acres of land, last above described and sued for by the plaintiff herein, have had and held actual, peaceable and adverse possession of same for more than ten years after the plaintiff's cause of action, if any it ever had, accrued, and before the commencement of this suit, and this they are ready to verify.

Wherefore these defendants now plead the ten years statute of limitation, and say that the plaintiff's cause of action, if any it ever had, is barred by the ten years statute of limitation.

9. And for further plea in this behalf these defendants say that the plaintiff ought not to have and maintain its aforesaid cause of action against them, because they say that they and those whose estate they have, and under whom they claim with privity, have had and held adverse, actual, peaceable, exclusive and continuous possession of said 160 acres of land, last above described and sued for by the plaintiff herein, using, cultivating and enjoying the same for a period of more than ten years after the plaintiff's cause of action accrued, if any it ever had, and before the commencement of this suit, taken and held under written memorandum of title, specifying the boundaries of said above described —, and duly recorded in the office of the County Clerk of San Patricio County, Texas, and this they are ready to verify.

Wherefore these defendants now plead the ten years statute of limitation, and say that the plaintiff's cause of action, if any it ever had, is now barred by the ten years statute of limitation.

10. And for further plea in this behalf these defendants say that the plaintiff ought not to have and maintain its aforesaid cause of action against these defendants, if any it ever had, because they say that they and those whose estate they have, and under whom
13 they claim with privity, have had actual, peaceable, exclusive and adverse possession of the 160 acres of land last above described, by actual enclosure, using, cultivating and enjoying the same for a period of more than ten years after the plaintiff's cause of action, if any it ever had, accrued, and before the commencement of this suit, and that such possession was taken, held and has been held continuously under such actual enclosure during all said period of time, and this they are ready to verify.

Wherefore these defendants now plead the ten years statute of limitation as to the said 160 acres of land, last above described, and so held by them and their predecessors in title under actual enclosure, and say that the plaintiff's cause of action if any it ever had, is

now and was at the commencement of this suit, and when this suit was brought, barred by the ten years statute of limitation.

11. Referring to the above paragraphs and subdivisions of this answer, numbered from 5 to 10, inclusive, and reiterating each and every of the averments of fact therein contained, as a part of this plea, these defendants say that the possession so had and held of the said 160 acres of land, last above described, by these defendants and their predecessors in title, whose estate they have, and under whom they claim in privity, was not only adverse to the plaintiff in this suit, but also to others and to the world, and that the aforesaid possession of the said 160 acres of land, was had and held with the requisites of the three years statute of limitation, the requisites of the five years statute of limitation, and also the ten years statute of limitation, and that by virtue thereof the title to the said 160 acres of land, aforesaid, in whomsoever the same may have been vested was divested out of them and vested in these defendants and their predecessors in title, under whom they claim with privity, and

14 these defendants now plead the title so acquired in bar of the plaintiff's cause of action against them.

12. These defendants say that at the time of the filing of this suit, and also prior thereto, they and those whose estate they have and under whom they claim with privity, were in the actual, peaceable and adverse possession of the said 160 acres of land, last above described and sued for by the plaintiff, claiming the same under title and color of title, and that they have had and held actual, peaceable, adverse possession of said 160 acres of land for more than twenty years last past, and that never, during said period of time, has the plaintiff been in the actual possession of said land so claimed by these defendants, or any part thereof, and that plaintiff has never exercised any acts of ownership over the land so held by these defendants, or asserted any claim thereto; but, on the contrary, these defendants say that they and those whose estate they have, and under whom they claim with privity, as aforesaid, have been for more than twenty years last past, and after the plaintiff's cause of action had accrued against these defendants, if any it ever had, and before this suit was brought, claiming the tract of land so held by these defendants under deed duly registered, and that they and those whose estate they have and under whom they claim with privity, have continuously during said period of time, claimed the said 160 acres of land, aforesaid, under deeds duly registered, paying all taxes thereon, and have had and held peaceable and adverse possession of the said land so claimed by these defendants, using, cultivating and enjoying the same, and that, further, for more than twenty years last past and after the plaintiff's cause of action had accrued against these defendants, if any it ever had, and before the bringing of this suit, they, these defendants, and those whose estate they have, and under whom they claim with privity, have had and held peaceable,

16 adverse possession of said 160 acres of land claimed by these defendants, using, cultivating and enjoying the same, and that such possession was taken, and has been held continuously during said period of time under written memorandum of title, describ-

ing said land by metes and bounds and fixing the claims of the defendants and their predecessors in title by deeds duly recorded in the deed records of San Patricio County, Texas, prior to the bringing of this suit.

13. Answering further herein these defendants say that for more than twenty years last past, and after the plaintiff's cause of action accrued against these defendants, if any it ever had, and before the bringing of this suit, these defendants and those whose estate they have, and under whom they claim with privity, have had and held actual, peaceable and adverse possession of the said 160 acres of land so claimed by them and sued for by the plaintiff herein.

Wherefore, these defendants say that they, and those whose estate they have, and under whom they claim with privity have had and held actual and adverse possession of said 160 acres of land, aforesaid, with the requisites of the three years statute of limitation, the requisites of the five years statute of limitation and also of the ten years statute of limitation, and that by virtue thereof these defendants have acquired the title to said 160 acres of land, and the same is now vested in them, and that they are entitled to a judgment against the plaintiff for the title to said land and quieting them in the possession thereof.

14. And for further plea in this behalf these defendants say that they, and those under whom they claim, have had adverse possession in good faith of the said 160 acres of land, last above described, and being a part of the lands sued for by the plaintiff herein, for more than one year next before the commencement of this suit. That on the 7th day of August, 1908, one W. L. Dusenbury was in

16 possession of the said 160 acres of land herein claimed by these defendants under a regular chain of transfer of title, and that on or about said last mentioned date the said W. L. Dusenbury by this general warranty deed, duly executed by him, conveyed to these defendants for a valuable consideration paid by these defendants, the said 160 acres of land last above described and claimed by these defendants and that these defendants believed and had good reason to believe that they thereby acquired a good and valid title thereto.

And for grounds of such belief these defendants say that they while negotiating for said land and before they had purchased the same consulted the agent of said W. L. Dusenbury, and also an attorney in reference to the condition of the title to said land, and was informed by said attorney and the said agent that the title to the 160 acres of land so claimed by these defendants was good and well vested in the said W. L. Dusenbury, and that if they purchased the said lands they would thereby acquire a good and valid title to the same, and so believing they closed the deal for the said land.

And these defendants further say that they and those under whom they claim have made permanent and valuable improvements on said land so claimed by them herein during the time they had possession of the same, as follows, to wit:

Clearing, grubbing and breaking 52 acres of land at \$20.00 per acre	\$1040.00
Building one four room house of the value of	700.00
Building one barn of the value of	200.00
Building one chicken house of the value of	25.00
Digging one cistern of the value of	50.00
Two miles of fencing of the value of	150.00
Erecting one windmill and paying therefor	70.00

Said improvements being of the reasonable aggregate value of \$2235.00

17 Wherefore the premises considered, these defendants say they have title to the said 160 acres of land in fee simple, and are in the actual possession thereof. That they now plead in bar of the plaintiff's cause of action against them, and they pray that on final trial hereof they have judgment against the plaintiff for the title to said 160 acres of land, aforesaid, and quieting these defendants in the possession thereof, and that they have judgment for their costs of suit, and for such other relief, general and special, that they may be entitled to either in law or in equity, whether specifically prayed for herein or not. But, should it be determined by the court that the plaintiff is entitled to recover against these defendants the land so claimed by them, then these defendants pray that they have judgment against the plaintiff for the value of the improvements aforesaid placed on said land by them, and for general and special relief.

15. And these defendants for further plea herein by way of cross action against the Coleman-Fulton Pasture Company, a corporation organized under the laws of the State of Texas, with its office at Gregory, San Patricio County, Texas; in charge of Joseph F. Green, who resides in San Patricio County, Texas, as the duly elected and acting secretary of said corporation and local agent W. L. Dusenbury, who resides in Washington County, Iowa, represents unto the Court; that the plaintiff, Houston Pasture Company sues to recover the said S. E. $\frac{1}{4}$ of said section 41, of the Geo. H. Paul Company subdivision of the Coleman-Fulton Pasture Company lands the same containing 160 acres, as above described, and claimed by these defendants. That on the 7th day of August, 1908, the said Coleman-Fulton Pasture Company, by its general warranty deed of that date, did convey unto the said W. L. Dusenbury the said 160 acres of land, aforesaid, now claimed by these defendants, for

18 a consideration of \$4,000.00; that on the 7th day of August, 1908, the said W. L. Dusenbury did by his general warranty deed convey to these defendants the said 160 acres of land above described and claimed by these defendants for a consideration of \$5,600.00 paid.

That in each and all of said last above mentioned deeds from the said Coleman-Fulton Pasture Company and the said W. L. Dusenbury, as aforesaid, it is recited, agreed and contracted, after the usual and formal parts of said deeds, as follows: "We do hereby bind our

selves, our heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto the said (grantee, naming him) their heirs and assigns forever against the claims of any and all persons whomsoever lawfully claiming or to claim the same or any part thereof." Whereby the said warrantors became liable and bound on their said warranty in case the title to said land failed. That if the plaintiff prevails in this suit it will be by reason of facts antedating the dates of said deeds; and, therefore, if the plaintiff prevails, the said Coleman-Fulton Pasture Company and the said W. L. Dusenbury will be responsible to these defendants on their said warranty.

Wherefore these defendants here now implead the said Coleman-Fulton Pasture Company and the said W. L. Dusenbury, and ask that they be made parties hereto, and that they be required to defend the title to the said 160 acres of land, aforesaid, so claimed by these defendants, and conveyed by said parties as aforesaid and warranted by them, and that in the event the plaintiff recovers herein for each acre the plaintiff may recover, these defendants have judgment against the said Coleman-Fulton Pasture Company and the said W. L. Dusenbury for the sum paid therefor by these defendants, with legal interest from the date of such payment, and for costs of suit, and for general and special relief, to which they may be
 19 entitled, in law or equity, whether specifically prayed for herein or not.

J. C. HOUTS,

Attorney for said Defendants.

Indorsements: No. 8 D. L. In the District Court of the United States for the Southern District of Texas, Corpus Christi. Houston Pasture Company vs. Alice State Bank, et al. Original Answer of Defendants Widergren and Anderson. Filed Jan. 4, 1915. L. C. Masterson, Clerk, By J. A. Mount, Deputy.

Original Answer of the Defendant T. N. Pullin.

Filed Jan. 4, 1915.

In the District Court of the United States for the Southern District of Texas, at Corpus Christi.

No. 8, D. L.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

Now comes the defendant, T. N. Pullin, and demurs generally to the plaintiff's petition, and says that the same is insufficient in law; of which he prays judgment of the court.

2. And now comes the defendant, T. N. Pullin, and answering the

plaintiff's petition, here now disclaims any right, title or claim in and to the land sued for by the plaintiff, and described in its petition, save and except the following portion of said land, to-wit: All that certain tract or parcel of land, situated in the County of San Patricio,

20 Texas, and more particularly described as follows: 166.8 acres of land, being the East $\frac{1}{2}$ of Fractional Block 56 of the Geo. H. Paul Company Subdivision of the Coleman-Fulton Pasture Company lands in San Patricio County, Texas, as per map of said subdivision on file in the office of the County Clerk of San Patricio County, Texas, known as Map of the Geo. H. Paul Company Subdivision of the Coleman-Fulton Pasture Co. lands in San Patricio County, lying South of Taft, to which said map reference is hereby made for a fuller description of said land.

Wherefore this defendant prays that as to all of said land sued for herein by the plaintiff, except the 166.8 acres last above described and claimed by this defendant, he go hence without day and recover his costs.

J. C. HOUTS,

Attorney for Defendant T. N. Pullin.

3. And for further answer herein this defendant denies all and singular the allegations in the plaintiff's petition contained, and of this he puts himself upon the country and prays judgment of the court.

3a. Defendant denies in toto the allegations in paragraphs 5, 6 & 7 of plaintiff's petition.

4. Referring to the 166.8 acres of land, last above described, this defendant say he is not guilty of the wrongs, trespasses and injuries complained of in the plaintiff's petition filed herein against him, and of this he puts himself upon the country, and prays judgment of the court.

5. And for further plea in this behalf this defendant says that the plaintiff ought not to have and maintain its said cause of action against him because, he says, that he and those whose estate he has, and under whom he claims with privity, have had and held actual peaceable, continuous and adverse possession of the said 166.8 acres of land, last above described, and sued for herein by the plaintiff,

21 under title from and under the sovereignty of the soil for more than three years after the plaintiff's cause of action against this defendant, if any it ever had, accrued, and before the commencement of this suit, and this he is ready to verify.

Wherefore this defendant pleads the three years statute of limitation, and says that the plaintiff's cause of action, if any it ever had, is barred by said three years statute of limitation.

6. This defendant says that he and those whose estate he has, and under whom he claims with privity, have had and held actual, peaceable, continuous and adverse possession of the said 166.8 acres of land, last above described, and sued for by the plaintiff under cover of title from and under the sovereignty of the soil for more than three years after the plaintiff's cause of action accrued against this

defendant, if any it ever had, and before the commencement of this suit, and this he is ready to verify.

Wherefore this defendant pleads the three years statute of limitation, and says that the plaintiff's cause of action against him, if any it ever had, is now barred by the said three years statute of limitation.

7. And for further plea in this behalf this defendant says that the plaintiff ought not to have and maintain its cause of action against him because, he says, that he and those whose estate he has, and under whom he claims with privity, claiming the said 166.8 acres of land last above described, and sued for by the plaintiff, under deeds duly registered, has had actual, peaceable and adverse possession of the said land, cultivating, using and enjoying the same and paying all taxes due thereon for a period of more than five years after the plaintiff's cause of action, if any it ever had, accrued and before the commencement of this suit.

Wherefore this defendant now pleads the five years statute of limitation, and says that the plaintiff's cause of action, if any it
22 ever had, is now barred by the said five years statute of limitation.

8. And for further plea in this behalf, this defendant says that the plaintiff ought not to have and maintain its aforesaid cause of action against him, because he says that he and those whose estate he has, and under whom he claims with privity, claiming to have a good and perfect right and title to the said 166.8 acres of land last above described and sued for by the plaintiff herein, has had and held actual, peaceable and adverse possession of same for more than ten years after the plaintiff's cause of action accrued, if any it ever had, and before the commencement of this suit, and this he is ready to verify.

Wherefore this defendant now pleads the ten years statute of limitation, and says that the plaintiff's cause of action, if any it ever had, is now barred by the said ten years statute of limitation.

9. And for further plea in this behalf this defendant says that the plaintiff ought not to have and maintain its aforesaid cause of action against him, because he says that he and those whose estate he has, and under whom he claims with privity, have had and held adverse, actual, peaceable, exclusive and continuous possession of said 166.8 acres of land, last above described and sued for by the plaintiff, using, cultivating and enjoying the same for a period of more than ten years after the plaintiff's cause of action, if any it ever had, accrued, and before the commencement of this suit, taken and held under written memoranda of title specifying the boundaries of said land last above described, and duly recorded in the office of the County Clerk of San Patricio County, Texas, and this he is ready to verify.

Wherefore this defendant now pleads the said ten years statute of limitation, and says that the plaintiff's cause of action, if any
23 it ever had against him, is now barred by the ten years statute of limitation.

10. And for further plea in this behalf this defendant says that the plaintiff ought not to have and maintain its aforesaid cause of

action against him, if any it ever had, because he says that he and those whose estate he has, and under whom he claims with privity, have had and held adverse, actual, peaceable and exclusive possession of said 166.8 acres of land last above described, by actual enclosure, using, cultivating and enjoying the same for a period of more than ten years after the plaintiff's cause of action had accrued against this defendant, if any it ever had, and before the commencement of this suit, and that such possession was taken, held, and has been held continuously under said actual enclosure during all of said period of time, and this, this defendant is ready to verify.

Wherefore, this defendant now pleads the said ten years statute of limitation as to the said 166.8 acres of land last above described, so held by him under actual enclosure, and says that the plaintiff's cause of action against him, if any it ever had, is now, and was at the commencement of this suit, and when this suit was brought, barred by the ten years statute of limitation.

11. Referring to the above paragraphs and subdivisions of this answer, numbered from 5 to 10, inclusive, and reiterating each and every of the averments of fact therein contained as a part of this plea, this defendant says that the possession so had and held of the said 166.8 acres of land, last above described, by this defendant and his predecessors in title, whose estate he has, and under whom he claims with privity, was not only adverse to the plaintiff in this suit, but also to others and to the world, and that the aforesaid possession of the said 166.8 acres of land last above described was had and held with the requisites of the three years' statute of limitation, the

24 five years statute of limitation and the said ten years statute of limitation, and that by virtue thereof the title to the said 166.8 acres of land, in whomsoever the same may have been vested was divested out of them and vested in this defendant and his predecessors in title, under whom he claims with privity, and this defendant now pleads the title so acquired in bar of the plaintiff's cause of action against him.

12. This defendant says that at the time of the filing of this suit, and also prior thereto he and those whose estate he has, and under whom he claims with privity, were in the actual, peaceable and adverse possession of the said 166.8 acres of land last above described and sued for by the plaintiff, claiming the same under title and color of title, and that he has had and held actual, peaceable and adverse possession of the said 166.8 acres of land last above described for more than twenty years last past, and that never, during the said period of time has the plaintiff been in the actual possession of said land so claimed and held by this defendant, or of any part thereof, and that plaintiff has never exercised any acts of ownership over the said land so held by this defendant, or asserted any claim thereto; but, on the contrary, this defendant says that he, and those whose estate he has, and under whom he claims with privity, as aforesaid, have been for more than twenty years last past, and after the plaintiff's cause of action had accrued against this defendant, if any it ever had, and before this suit was brought, claiming the said tract of land so claimed by this defendant under deeds duly registered, and that he and those whose estate he has, and under whom he

claims with privity, have continuously during said time claimed the said 166.8 acres of land under deeds duly registered, paying all taxes thereon, and have had and held peaceable and adverse title and possession of the said land herein claimed by this defendant, using, cultivating and enjoying the same, and, further, that for

25 more than twenty years last past, and after the plaintiff's cause of action had accrued against this defendant, if any it ever had, and before the bringing of this suit, he, this defendant, and those whose estate he has and under whom he claims with privity, have had and held peaceable and adverse possession of the said 166.8 acres of land last above described and claimed by this defendant, using, cultivating and enjoying the same, and that such possession was taken and has been held continuously during said entire period of time under written memorandum of title describing the said lands by metes and bounds, and fixing the claims of this defendant and his predecessors in title by deeds duly recorded in the deed records of San Patricio County, Texas, prior to the bringing of this suit.

13. Answering further herein this defendant says that for more than twenty years last past, and after the plaintiff's cause of action against this defendant accrued, if any it ever had, and before the bringing of this suit, this defendant, and those whose estate he has, and under whom he claims with privity, have had and held actual, peaceable and adverse possession of the said 166.8 acres of land last above described, and sued for by the plaintiff herein.

Wherefore this defendant says that he and those whose estate he has and under whom he claims privity, have had and held actual and adverse possession of said 166.8 acres of land last above described with the requisites of the three years statute of limitation, the five years statute of limitation, and also with the requisites of the ten years statute of limitation, and that by virtue thereof this defendant has acquired the title to said land, and the same is now vested in him, and that he is entitled to a judgment against the plaintiff for the title to said land and quieting this defendant in the possession thereof.

14. And for further plea in this behalf this defendant says
28 and represents unto the court that he, and those under whom he claims have had adverse possession in good faith of the said 166.8 acres of land claimed by him for more than one year next before the commencement of this action. That on or about the first day of October, 1913, J. W. Cook and W. F. Traxler were in the possession of the said 166.8 acres of land, claiming the same under regular chain of transfer of title. That on said date the said J. W. Cook and W. F. Traxler conveyed the said 166.8 acres of land to this defendant for a valuable consideration to them paid and secured to be paid by this defendant, and this defendant believed and had good reason to believe that he thereby acquired a good and valid title thereto, and for grounds of such belief this defendant says that he consulted an experienced abstract man, and also a real estate man of good standing in the town of Sinton, Texas, while he was negotiating for the purchase of said land, and before he had purchased the

same, and that the said parties advised and informed this defendant, in substance and effect that the title to said land was good and that same was securely vested in the said J. W. Cook and W. F. Traxler, and that if he, this defendant purchased the said land he would thereby acquire from said parties a good and valid title thereto, and that the claim being made by the Houston heirs to the said land was groundless and without foundation; that this defendant is an uneducated man, knows nothing about examining an abstract of title, and relied in said purchase on the statements and advice made to him by the aforesaid abstractor and real estate man. And this defendant further says that he and those under whom he claims have made permanent and valuable improvements on the said 166.8 acres of land, during the time they have had such possession, as follows, to-wit:

27	One one-room house of the value of.....	\$400.00
	Addition of one room to said house.....	350.00
	Fencing 60 acres of land.....	50.00
	Clearing, Grubbing and breaking 100 acres of land.	2100.00
Total		\$2900.00

Wherefore, the premises considered, this defendant says that he has title to the said 166.8 acres of land in fee simple, and is in the actual possession thereof. That he now pleads in bar of the plaintiff's cause of action against him and prays that on final trial he have judgment against the plaintiff for the title to said 166.8 acres of land, and quieting this defendant in the possession thereof, and that he have judgment for his costs of suit, and for such other relief, general and special, as he may be entitled to in law or equity, whether specifically prayed for herein or not.

But should it be determined by the court that the plaintiff is entitled to recover against this defendant the land so claimed by him, then he prays that he have judgment against the plaintiff for the value of the improvements aforesaid placed on said land, and for general and special relief.

J. C. HOUTS,
Attorney for Defendant.

15. And for further plea herein this defendant by way of cross action against the Coleman-Fulton Pasture Company, a corporation duly incorporated under the laws of the State of Texas, with its office at Gregory, San Patricio County, Texas, in charge of Joseph F. Green, who resides in San Patricio County, Texas, and who is the legally qualified and acting secretary of said corporation and local agent thereof; W. L. Dusenbury, who resides in Washington County,

Iowa, E. Cubage, who resides in Nueces County, Texas, J. C. Daugherty, who resides in Bee County, Texas, J. W. Cook who resides in Lavaca County, Texas, S. J. Tipton, who resides in Carnes County, Texas, W. F. Traxler, who resides in Bexar County, Texas, represents unto the court that in this suit the plaintiff sues to recover the 166.8 acres of land hereinbefore described

and claimed by this defendant; that on the 10th day of September, 1908, the said Coleman-Fulton Pasture Company conveyed the said 166.8 acres of land to W. L. Dusenbury for a consideration of \$4567.20; that on the 10th day of September, 1908, the said W. L. Dusenbury conveyed the said 166.8 acres of land to E. Cubage, for a consideration of \$1,785.00; that on the 10th day of February, 1910, the said E. Cubage conveyed the said 166.8 acres of land to J. C. Daugherty for a consideration of \$6,311.05; that on the 24th day of July, 1911, the said J. C. Daugherty conveyed the said 166.8 acres of land to J. W. Cook for a consideration of \$7,473.60; that on the 29th day of September, 1911, the said J. W. Cook conveyed $\frac{1}{4}$ interest in the said 166.8 acres of land to S. J. Tipton and W. F. Traxler for a consideration of \$4,334.85; that on the 9th day of October, 1912, the said S. J. Tipton conveyed a one third interest in said land to the said J. W. Cook and W. F. Traxler for a consideration of \$2,100.00; that on the 1st day of October, 1913, the said J. W. Cook and W. F. Traxler conveyed the said 166.8 acres of land to this defendant for a consideration of \$10,700.00, \$4,000.00 of which amount was at that time paid in cash, and this defendant assumed as a part of said consideration the payment of two certain promissory notes, each dated September 1, 1908, each in the sum of \$639.40, executed by W. L. Dusenbury, payable to the order of the Coleman-Fulton Pasture Company, said notes due on or before December 1st of the years 1913 and 1914, respectively, and the balance of said consideration is evidenced by this defendant's five certain

promissory notes, executed on the date of said deed, each in the sum of \$1,084.24, and payable to the order of the said J. W. Cook and W. F. Traxler, and due in 1, 2, 3, 4 and 5 years after date, respectively, said notes bearing eight per cent interest from November 1, 1913, and containing the usual attorney fees clause. That in addition to the \$4,000.00 paid in cash, as aforesaid, this defendant has paid the said two notes in the sum of \$639.41, executed by W. L. Dusenbury, as aforesaid, together with all interest due thereon; and has also paid interest on the remainder of said notes to the amount of \$432.00, making a total of \$5,710.82 which this defendant has paid in cash on the aforesaid consideration for said 166.8 acres of land so conveyed to him by the said J. W. Cook and W. F. Traxler; that the said five notes each in the sum of \$1,084.24, above mentioned, are outstanding and unpaid, except the interest on the same to the amount of \$432.00, which this defendant has paid as aforesaid.

That in the said deed from said J. W. Cook and W. F. Traxler to this defendant, and in all of the deeds hereinbefore mentioned, it is recited, contracted and agreed, after the usual and formal parts of said deeds, as follows: "And we do hereby bind ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said (grantee, naming him or them) his heirs and assigns forever, against the claims of all persons whomsoever lawfully claiming or to claim the same or any part thereof." Whereby all of said warrantors became and were liable to this defendant, and to the grantees in said deeds, in case the title to

said land failed. That if the plaintiff prevails in this suit it will be by reason of facts antedating the date of each of the above mentioned deeds, and, thereby, if the plaintiff prevails all of the said warrantors will be liable and bound to this defendant on their said warranty.

Wherefore this defendant, T. N. Pullin, here now impleads all of the said warrantors in the deeds aforesaid, and asks that
30 they be made parties hereto, and that they be required to defend the title to the said 166.8 acres of land so conveyed to this defendant as aforesaid, and warranted by them; and that in the event the plaintiff recovers herein, then for each acre of said land the plaintiff may recover, this defendant do have judgment against the said warrantors for the sum paid therefor by this defendant, in cash with his legal interest from the dates of such payments, and also for judgment against the said warrantors for the amount of the aforesaid outstanding notes, with all interest thereon in case said warrantors fail to deliver said notes into court on the trial hereof for cancellation, and for costs of suit, and for general and special relief to which this defendant may be entitled, either in law or in equity, whether specifically prayed for herein or not.

J. C. HOUTS,

Attorney for the Defendant T. N. Pullin.

Indorsements: No. 8 D. L. In District Court United States, Southern District of Texas, at Corpus Christi, Houston Pasture Company vs. Alice State Bank et al. Original Answer of the Defendant T. N. Pullin. Filed Jan: 4, 1915. L. C. Masterson, Clerk, By J. A. Mount, Deputy.

31 *Answer and Cross-action of Defendants J. W. Cook et al.*

Filed May 12th, 1915.

In the United States District Court for the Southern District of Texas, at Corpus Christi, May Term, 1915.

No. 8.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et al.

Comes the defendants J. W. Cook, S. J. Tipton and W. F. Traxler, and in answer to the plaintiff's demands as shown by the original petition filed herein, says the same is insufficient in law, and shows no cause of action, wherefore they pray judgment of the court.

J. D. TODD,

Attorney for Above-named Defendants.

Further answering herein, these defendants deny each and every allegation in plaintiff's petition contained, except where the same

or any part thereof may be specifically admitted herein, or in the pleas hereinafter adopted, and of this they put themselves upon the country and pray judgment.

J. D. TODD,

Attorneys for Above-named Defendants.

For further answer, these defendants adopt the pleas of their co-defendant, T. N. Pullin, filed herein, insofar as the same is not hereby demurred to and denied, and these defendants especially and expressly urge each and every allegation of their said co-defendant,

32 T. N. Pullin's, pleas herein as against the plaintiff, and each and all other codefendants herein, except the co-defendants, J. W. Cook, S. J. Tipton and W. F. Traxler, and of this they pray judgment of the court, in the way and manner as prayed for in the pleas of their co-defendant, T. N. Pullin.

J. D. TODD,

Attorneys for Defendants Cook, Tipton and Traxler.

These defendants, Cook, Tipton and Traxler, hereby expressly disclaim as against the plaintiff and all other defendants herein, any interest whatever in the 166.8 acres of land described in their co-defendant, T. N. Pullin's pleas, or the whole body of land sued for herein by the plaintiff, and these defendants ask that they go hence without day, recovering their costs herein.

J. D. TODD,

Attorneys for Cook, Tipton and Traxler, Defts.

And for further answer herein, if necessary, these defendants, J. W. Cook, S. J. Tipton and W. F. Traxler, adopt the several pleas of the defendant T. N. Pullin, setting up limitation against the plaintiff's alleged cause of action, and they now here urge each and every such allegations of their co-defendant, T. N. Pullin, as to said pleas of limitation, and of this they put themselves upon the country and pray judgment of the court, and that they go hence without day, recovering their costs.

J. D. TODD,

Attorney for Defendants Cook, Tipton and Traxler.

For further answer herein, these defendants, J. W. Cook, S. J. Tipton and W. F. Traxler, especially urge the pleas and adopt the same of their co-defendant, T. N. Pullin, wherein the same set up a cross action against all co-defendants herein who have heretofore owned and conveyed the 166.8 acres of land described in the pleas of the said defendant, T. N. Pullin, on their several warrants, and these defendants say that should the plaintiff recover the said 166.8 acres or damages as prayed for in any sum they should recover, in the way and manner prayed for by the defendant Pullin as against each and every of the warrantors of the title to said 166.8 acres of land, and in lieu, place and stead of the defendant T. N. Pullin, and of this they pray judgment.

J. D. TODD,

Attorney for Defendants Cook, Tipton and Traxler.

Further answering herein, by way of cross action against their co-defendant, J. C. Dougherty, these defendants, J. W. Cook, S. J. Tipton and W. F. Traxler, say that should the plaintiff recover herein the 166.8 acres of land shown by the pleas of defendant Pullin to have been owned and conveyed by these defendants to him, they should and ought to recover of and from their said co-defendant, J. C. Dougherty, who resides in the County of Bee, and State of Texas, the sums of money, to-wit: \$7,473.60, which was paid by the said J. W. Cook to the said defendant J. C. Dougherty, when he purchased said land from said Dougherty on the 24th day of July, 1911, as shown by the deed from said J. C. Dougherty of said J. W. Cook of said date, because the said J. C. Dougherty, in said deed, expressly stipulates that he warrants and forever defends the title to said 166.8 acres of land as against every person whomsoever lawfully claiming or to claim the same or any part thereof; and that these defendants ought to recover for and on behalf of the said J. W. Cook, the aforesaid sum of \$7,473.60 so paid the said J. C. Dougherty for said 166.8 acres of land with legal interest from July 24, 1911; and for all of which the said Cook and his co-defendants Tipton and Traxler pray judgment against the said defendant J. C. Dougherty, and for all costs, and general and special relief, as his or their interests may appear from these pleadings and the pleas of the defendant Pullin adopted herein.

J. D. TODD,

Attorneys for Defendants Cook, Tipton and Traxler.

34 Further answering herein, these defendants Cook, Tipton and Traxler adopt the pleas of the said defendant Pullin, set up in paragraph 14 of his cross action and answer, wherein he alleges valuable improvements made in good faith on said 166.8 acres of land; and especially do these defendants Cook, Tipton and Traxler pray that they recover the sum of \$2,100.00 for "clearing, grubbing and breaking 100 acres" of said 166.8 acres, which said sum was expended by them the said Cook, Tipton and Traxler while they owned said 166.8 acres in good faith without notice of any claims or demands outstanding against said land; and they adopt the aforesaid pleas of the defendant Pullin with regard to said valuable improvements, and pray that in case the plaintiff recovers said 166.8 acres or any part of same, that these defendants be reimbursed for the aforesaid sums of money paid for said improvements with legal interest thereon from dates of the said payments.

J. D. TODD,

Attorney for Defendants Cook, Tipton and Traxler.

And by way of cross action against the Defendant Pullin, these defendants Cook, Tipton and Traxler say that the said defendant Pullin ought not to recover against them or either of them for the reason that by the terms of the contract of purchase entered into between the defendant Cook and Traxler and the defendant Pullin, the same dated September 29, 1913, the said defendant Pullin agreed to and did acknowledge full notice and knowledge of the claims and

demands of the plaintiff's suit and demands herein against the said 166.8 acres of land; and he, the said defendant, Pullin expressly waived all defects, if any, in the title to said 166.8 acres so bought by him from the defendants Cook and Traxler, by reason of the demands or claims of the plaintiff herein; and that by reason of the aforesaid stipulation and agreement of waiver of said defects in

35 said title said defendant Pullin is now estopped from setting up any claim as against either of these defendants Cook, Traxler or Tipton, on warranties of title or otherwise; that said defendant Pullin accepted said title to said 166.8 acres with such claims and demands as are now set up by the plaintiff already asserted in court, and he then and there by the terms of said contract of purchase fully and expressly waived any and all defects if any existing by reason of the claims and demands of the plaintiff as against said title to said 166.8 acres or any part of same.

Wherefore these defendants pray that they go hence without day as to the defendant Pullin and recover their costs.

And these defendants Cook, Tipton and Traxler pray that the said defendant J. C. Dougherty, who is a resident of Beeville, Bee County, Texas, be cited to appear at the next regular term of this Honorable Court and answer in this behalf, and that on final hearing they have their judgments in the way and manner as herein set forth, and in the order thereof, and for general and special relief.

J. D. TODD,

Attorneys for Defendants Cook, Tipton and Traxler.

SINTON, TEXAS, Sept. 20th, 1913.

Received from T. N. Pullen of the County of Karnes, State of Texas, the sum of \$500.00, earnest money, to close sale to himself of the following described parcel of land in San Patricio Co. Texas.—166.8 acres, the East one half Fr. Blk or Sect. No. 56 of the Geo. H. Paul Co.'s subdivision of the lands of the Coleman Fulton Pasture Co., from J. W. Cook and W. F. Traxler, acting herein by their agent, J. D. Cook, real estate agent at Sinton, Texas, at a total sale price of \$10,700.00, to be paid as follows: The sum of \$4,000.00

36 cash, on the delivery of an abstract showing a clear and merchantable title, free from incumbrances, except as hereinafter stated, said title to be in said Cook and Traxler, the sum of \$500 herein receipted for to be taken as a credit on said first payment, and the execution and delivery to the said Cook and Traxler, or to their agent J. D. Cook, by the said T. N. Pullen of five vendors' lien notes each for the sum of \$1,084.00, payable to said Cook and Traxler, and to be dated the date of the deed hereinafter described, and said notes due and payable Nov. 1st, 1914-1915-1916-1917- and 1918 after date, bearing interest and 8 per cent per annum from dates, and the usual stipulation for attorneys' fees at 10%, and said note to acknowledge vendor's lien on the premises to be conveyed by said deed, and the further consideration that said Pullen assume to pay off and discharge as his own debt, two vendors' lien notes remaining unpaid for the sum of \$639.41 each, and payable to the Coleman-

Fulton Pasture Co. date Sept. 10, 1908 and due Dec. 1st, 1913 and 1914 after date—interest to Nov. 1st 1913 to be paid by said Cook and Traxler, the five notes for \$1,084 each above described to be signed by the said T. N. Pullen.

Upon the said cash payment as aforesaid and the delivery of the said notes mentioned, and the assumption of said two notes above described, the said Cook and Traxler, or their duly authorized agent shall thereupon deliver to the said T. N. Pullen the certain warranty deed of the said Cook and Traxler to the property, free from expense to said T. N. Pullen.

It is further understood that the title to said property is to be merchantable, or to be made perfect and merchantable within a reasonable time, not to exceed thirty days from the date hereof, or this earnest money shall be refunded to the said T. N. Pullen.

It is understood by the said T. N. Pullen that a suit is now pending against the Coleman Fulton Pasture Co. by the heirs of 37 Sam Houston, to recover the Sam Houston Survey, of which the land above described is a subdivision, but the said Cook and Traxler are not parties to said suit, and the said T. N. Pullen, understanding the nature of this suit, agrees not to urge it as an objection to the marketableness of said title but agrees so far as the suit is concerned, to waive the same as an objection to the title as aforesaid.

The abstract of title is to be furnished up to date to the said Cook and Traxler at their expense, and taxes on the property to be paid up to and including the year 1913.

The parties are allowed 30 days in which to consummate the details of this trade, and if not consummated or finished by that time, then the earnest money mentioned above is to be refunded; if the fault be that of the said Cook and Traxler, whereupon the said T. N. Pullen may then proceed to establish his rights according to law,—but if the fault be that of the said T. N. Pullen, then the amount so received as earnest money is to be forfeited by said Pullen to said Cook and Traxler, as their agreed, fixed, stipulated, and liquidated damages, and at once become the property of said Cook and Traxler as their damages as aforesaid, and said forfeiture being declared, the said Cook and Traxler shall thereupon become released from any further liability by reason of the premises.

Witness our hand this the 29th of Sept. 1913.

COOK & TRAXLER,
By J. D. COOK, Agent.

I accept the terms of the above contract and agree to abide its terms.

his
T. N. x PULLEN
mark.

Witness:

J. G. COOK,
J. H. PULLEN.

23 Indorsements: No. 3, Houston Pasture Co. vs. Alice State Bank, et al. Answer and Cross Action of Defendants J. W. Cook, et al. Filed May 12th, 1915, L. C. Masterson, Clerk, By J. A. Mount, Deputy.

Original Answer of J. C. Dougherty.

Filed May 26, 1915.

United States District Court for Southern District of Texas, at Corpus Christi.

D. L., No. 8.

HOUSTON PASTURE COMPANY.

vs.

ALICE STATE BANK et al.

Now comes J. C. Dougherty, who has been impleaded by the defendant T. N. Pullin as warrantor, and adopts the answer of the said T. N. Pullin, to-wit, the general and special demurrers and disclaimer of said Pullin, and the answer upon the merits herein as set forth in Paragraphs 2, 3A, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of said answer, and alleges that the said allegations are true.

This defendant further alleges that the 166.8 acres of land described in the answer of defendant Pullin was conveyed by the defendant, the Coleman Fulton Pasture Company, to defendant, W. L. Dusenbury, on the 10th day of September, 1906, for a consideration of \$4,567.20, and that on the 10th day of September, 1908, the said W. L. Dusenbury conveyed the 166.8 acres of land to E. Cubage, for a consideration of \$1,785.00; that on the 10th day of February,

30 A. D. 1910, the said E. Cubage conveyed said 166.8 acres of land to this defendant for a consideration of \$6,311.05, which consideration has been paid to the said E. Cubage, and in the deed from E. Cubage to this defendant, and in all deeds hereinbefore mentioned, it was recited, contracted and agreed, after the usual and formal parts of said deeds, as follows: "And we do hereby bind ourselves, our heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said (grantee, naming him or them) his heirs and assigns forever, against the claims of all persons whomsoever lawfully claiming or to claim the same or any part thereof," whereby all of said warrantors became liable to this defendant, and to the grantee in said deeds, in case the title to said land failed. That if the plaintiff prevails in this suit it will be by reason of facts antedating the date of each of the above mentioned deeds, and, thereby, if the plaintiff prevails all of said warrantors will be liable and bound to this defendant on their said warranty.

Wherefore this defendant, J. C. Dougherty, here now impleads all of the said warrantors in the said deed, and asks that they be made parties hereto, and that they be required to defend the title to this

168.8 acres of land so conveyed to this defendant as aforesaid, and warranted by them, and that in the event the plaintiff recovers herein, and the defendant Pullin recovers over against this defendant upon his warranty, that this defendant have judgment against the said warrantors for such sum, the sum paid therefor by this defendant, with legal interest from the dates of such payment, and for costs of suit, and for such general and special relief to which this defendant may be entitled in law.

J. R. DOUGHERTY,

Attorney for Defendant J. C. Dougherty.

Indorsements: D. L. No. 8, In the United States District Court for the Southern District of Texas, at Corpus Christi. Houston Pasture Co., vs. Alice State Bank, et al. Original Answer of J. C. Dougherty, Filed May 26, 1915, L. C. Masterson, Clerk, By J. A. Mount, Deputy.

40

Original Answer of E. Cubage.

Filed May 24, 1915.

In the District Court of the United States for the Southern District of Texas, at Corpus Christi.

No. 8, D. L.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et al.

To said Honorable Court:—

Now Comes E. Cubage, having been vouched in as defendant by the defendant, T. N. Pullin and makes this, his original Answer:

I.

Defendant excepts to the original petition of plaintiff on file herein because the same states no cause of action and is insufficient in law. Of which general demurrer he prays judgment of the court.

II.

Defendant excepts to the cross-action of defendant T. N. Pullin as same appears in the last numbered division of said defendant's original answer file herein on the 4th day of January 1915 because the same states no cause of action against this defendant and is insufficient in law. Of which general demurrer he prays judgment of the court.

III.

And now comes defendant and adopts as a part of his answer that part of the original answer of said defendant T. N. Pullin from the

beginning thereof down to, but not including his cross-action; and here and now makes the same a part of his answer and defence in this suit. And of this he puts himself upon the country.

41

IV.

And now comes defendant and denies each and every allegation in the said cross-action of defendant T. N. Pullin contained. And of this he puts himself upon the country.

V.

And now comes defendant and admits and adopts as his own all the allegations in the cross-action of defendant Pullin contained except that part thereof stating that the consideration for the conveyance of the land involved in such cross-action from W. L. Dusenbery to E. C. Cubage, was Seventeen Hundred and Eighty-five (\$1,785.0) Dollars; which part of such cross action this defendant denies and alleges on the contrary that on the 10th day of September 1908 to said W. L. Dusenbery conveyed the said 166.8 acres of land to E. Cubage for a consideration of Seventeen Hundred and Eighty-five (\$1,785.00) Dollars, in cash, and Four Thousand Eight Hundred and Forty-seven (\$4,847.00) Dollars as agreed value of services performed by the said E. Cubage for and in behalf of the said W. L. Dusenbery and of his principal George H. Paul; and that in truth and in fact the consideration paid by the said E. Cubage to the said W. L. Dusenbery for such conveyance was Six Thousand Six Hundred and Thirty-two (\$6,632.00) Dollars.

Premises considered, this defendant prays that plaintiff take nothing by its suit and that in the event a recovery be had against him in any amount in this suit that he do have judgment over against the warrantors preceding him for such sum so adjudged against this defendant together with legal interest thereon from the date of such payment and for costs of suit and for such other and further relief as he may be entitled to either in law or equity whether specifically prayed for herein or not.

KLEBERG & STAYTON,
Attorneys for Defendant.

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Indorsements: Original Answer of E. Cubage. Filed May 24, 1915. L. C. Masterson, Clerk, By J. A. Mount, Deputy.

*First Amended Original Answer of Defendant, Coleman-Fulton
Pasture Company.*

Filed Jan. 4, 1915.

In the United States District Court for the Southern District of
Texas, at Corpus Christi, Texas.

No. D. L. 8.

HOUSTON PASTURES COMPANY

VS.

ALICE STATE BANK et al.

1. Now comes the defendant, Coleman-Fulton Pasture Company, and in reply to plaintiff's first amended original petition, says that the same is insufficient in law to entitle the plaintiff to the relief sought and states no cause of action as against this defendant, whereof this defendant prays judgment of the court.

2. In case the foregoing demurrer is overruled, then comes the defendant and says that it is not guilty of the wrongs, trespasses and injuries complained of by the plaintiff in said first amended original petition filed by plaintiff herein, and of this it puts itself upon the country.

3. Further specially answering herein, this defendant says — denies each and every allegation contained in plaintiff's petition and demands strict proof.

4. Further specially answering herein, this defendant says that as to all that portion of said petition which alleges that the
43 defendant is a corporation duly incorporated under and by virtue of the laws of the State of Louisiana, with its domicile at Benton, Bossier Parish, Louisiana, this defendant says it is not in possession of sufficient information to either affirm or deny and demands strict proof.

5. This defendant denies that on or about May 20, 1914, the plaintiff was lawfully seized and possessed of the land described in plaintiff's petition in fee simple, and further denies that upon said date the defendant unlawfully entered upon said premises and ejected the plaintiff therefrom, and denies they it has continued to unlawfully withhold the plaintiff from the possession of said premises, to the plaintiff's damage in the sum of Five Thousand (\$5,000.00) Dollars, and that the said rental value of said land was the sum of \$3,840.00 per year.

6. This defendant denies that the plaintiff is entitled to the relief prayed for in the last paragraph of its petition.

7. And for further plea in this behalf this defendant says that plaintiff ought not to have and maintain their aforesaid cause of action against it, because it says that it and those whose estate it has, and under whom it claims with privity, have had and held actual, peaceable, continuous and adverse possession of the tract of land

sued for and described in plaintiff's petition under title from and under the sovereignty of the soil for more than three years after plaintiff's cause of action accrued and before the commencement of this suit, and of this it is ready to verify. Wherefore, defendant pleads the three years Statute of Limitation and says that plaintiff's cause of action, if any they ever had, is now barred by the Three Years Statute of Limitation.

8. Defendant says that it and those whose estate it has, and under whom it claims with privity, have had and held actual, peace-
44 and adverse possession of the tract of land sued for and described in plaintiff's petition, under color of title from and under the sovereignty of the soil for more than three years after plaintiffs' cause of action accrued and before the commencement of this suit, and this it is ready to verify. Wherefore, defendant pleads the Three Years Statute of Limitation and says that plaintiffs' cause of action, if any they ever had, is now barred by the Three years Statute of Limitation.

9. And for further plea in this behalf this defendant says that plaintiffs ought not to have and maintain their cause of action against it, because it says that it and those whose estates it has, and under whom it claims with privity, claiming the tract of land sued for and described in plaintiffs' petition, under deeds duly registered, has had peaceable continuous, adverse and exclusive possession of said land, cultivating, using and enjoying the same and paying all taxes due thereon for a period of more than five years after plaintiffs' cause of action accrued and before the commencement of this suit. Wherefore, defendant now pleads the Five Years Statute of Limitation and says that plaintiffs' cause of action, if any they ever had, is now barred by the Five Years Statute of Limitation.

10. And for further plea in this behalf this defendant says that plaintiffs ought not to have and maintain their aforesaid cause of action against it, because it says that it and those whose estate it has, and under whom it claims with privity, claiming to have a good and perfect right and title to the land described in plaintiff's petition, has had and held actual, peaceable and adverse possession of the same for a period of more than ten years after plaintiffs' cause of action accrued and before the commencement of this suit, and this it is ready to verify. Wherefore, defendant now pleads the Ten
Years Statute of Limitation and says that plaintiffs' cause
45 of action, if any they ever had, is now barred by the Ten Years' Statute of Limitation.

11. And for further plea in this behalf defendant says that plaintiffs ought not to have and maintain their aforesaid cause of action against it, because it says that it and those whose estate it has, and under whom it claims with privity, have had and held actual, peaceable, adverse, exclusive and continuous possession of the tract of land sued for and described in plaintiffs' petition, using, cultivating and enjoying same for a period of more than ten years after plaintiffs' cause of action accrued and before the commencement of this suit, taken and held under written memoranda of title, specifying the boundaries of said tract and duly recorded in the office of the

County Clerk of San Patricio County, Texas, and this it is ready to verify. Wherefore, defendant now pleads the Ten Years' Statute of Limitation and says that plaintiffs' cause of action, if any they ever had, is now barred by the Ten Years' Statute of Limitation.

12. And for further plea in this behalf defendant says that plaintiffs ought not to have and maintain their aforesaid cause of action, if any they have against it, because it says that it and those whose estate it has, and under whom it claims with privity, have had and held peaceable, adverse, exclusive and actual possession of the land claimed in plaintiffs' petition by actual enclosure, cultivating, using and enjoying the same for a period of ten years after plaintiffs' cause of action had accrued and before the commencement of this suit, and that such possession was taken and has been held continuously under actual enclosure during said period, and this defendant is ready to verify. Wherefore, defendant now pleads the Ten Years Statute of Limitation, as to the said tract of land so held by it in actual enclosure, and says that plaintiffs' cause of action, if any they ever had, is now and was, when this suit was brought, barred by the Ten Years' Statute of Limitation.

46 Premises considered, defendant prays that plaintiffs take nothing by their suit; that it go hence without day, and recover of plaintiffs its costs in this behalf expended.

Referring to the above paragraphs or subdivisions of this answer, numbered 7th, 8th, 9th, 10th, 11th, and 12th, and reiterating each and every the averments of fact therein contained as a part of this plea, defendant says that the possession so had and held of said land by this defendant and its predecessors in title, whose estate it had and under whom it claims with privity, was not only adverse to the plaintiffs in this suit, but was also adverse as to all others and to the world, and that possession of the land was so had and held with the requisites with the Three and the Five and the Ten Years' Statutes of Limitation; and that in virtue thereof the title to the land, in whosoever the same may have been, was divested out of them and vested in this defendant and its predecessors of title, under whom it claims with privity, and defendant now pleads the title so acquired in bar of plaintiffs' cause of action.

13. Defendant says that at the time of filing of this suit and also prior thereto it and those whose estate it has, and under whom it claims with privity were in actual, peaceable, adverse and exclusive possession of the tract of land sued for and described in plaintiffs' petition, claiming the same under title and color of title, and that it has held actual, peaceable, and adverse possession of said land continuously for more than twenty years last past; and that never during said period of time have the plaintiffs or either or any of them been in the actual possession of said tract of land, or any part thereof, and that they have never exercised any acts of ownership over said land, or asserted any claim thereto, but on the contrary, defendant says that it and those whose estate it has, and under whom it claims with privity, have been for more than twenty years last past, and after plaintiff's cause of action had accrued, and
47 before this suit was brought, claiming the tract of land sued for and described in plaintiffs petition, under deeds duly

registered, and that it and those whose estate it has and under whom it claims with privity, have continuously, during said period of time, claimed said land, under duly registered deeds, and paid all taxes on said land, and have had and held actual, peaceable and adverse possession of the land, using, cultivating and enjoying the same; and further, that for more than twenty years last past, and after plaintiffs cause of action had accrued, and before the bringing of this suit, it and those whose estate it had, and under whom it claims with privity have had and held peaceable, adverse and exclusive possession of the land sued for and described in plaintiffs petition, using, cultivating and enjoying the same, and that said possession was taken and has been held continuously during said entire period of time under written memoranda of title describing said land by metes and bounds and fixing the claims of this defendant and its predecessors in title by deeds duly recorded in the Deed Records of San Patricio County, Texas, prior to the bringing of this suit.

14. And further, that for more than twenty years last past and after plaintiffs' cause of action had accrued, if any it ever had, and before the bringing of this suit that defendant and those whose estate it has, and under whom it claims with privity, have had and held actual, peaceable, adverse and exclusive possession of the land sued for and described in plaintiffs' petition.

15. Wherefore, defendant says that it and those whose estate it has, have had and held actual possession of said land, with the requisites of the Five Years' Statutes of Limitation, and also with the requisites of the Ten Years' Statutes of Limitation, and that by virtue thereof defendant has acquired the title to said tract of land, and the same is now vested in it, and that it is entitled
48 to a judgment against plaintiffs for the title to the land, and quieting this defendant in its possession thereof.

16. Defendant further says that it is the owner seized and possessed in fee simple of said tract of land, and is entitled to the possession thereof, and that plaintiffs' claim to be the owners and entitled to the possession of said land, and are continuously seeking to oust defendant from the possession thereof and to take possession thereof themselves; and that plaintiffs, under a contended claim of title, have, since the institution of this suit, by the bringing of this suit and otherwise, asserted that they own said land and are entitled to the possession thereof, and have persistently sought to oust defendant and take possession of the land themselves, and this pretended claim of plaintiffs has cast a cloud upon the title of this defendant, which prevents it from selling, leasing, mortgaging or otherwise disposing of the land to an advantage, and that defendant has been and is now greatly damaged thereby.

17. Wherefore, premises considered, defendant says that it has title to the land in fee simple and in the actual possession thereof, and it now pleads in bar of plaintiffs' cause of action and sue in re-convention and prays that on final trial it have judgment against plaintiffs for the title to said land, and quieting this defendant in the possession thereof, and that it have judgment for its costs and for

such other relief, general and special, as it may be entitled to under the facts in law or in equity.

TEMPLETON, BROOKS, NAPIER & OGDEN,
Attorneys for Defendant, Coleman-Fulton Pasture Company.

Indorsements: No. D. L. 8. In the United States District Court for the Southern District of Texas, Corpus Christi, Texas. Houston Pasture Company vs. Alice State Bank et al. First Amended Original Answer of Defendant, Coleman-Fulton Pasture Company. Filed Jan. 4, 1915. L. C. Masterson, Clerk, by J. A. Mount, Deputy.

49 *Answer of Coleman Fulton Pasture Co., Remote Warrantor.*

Filed May 25, 1915.

In the District Court of the United States for the Southern District of Texas, at Corpus Christi.

D. L., No. 8.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK.

Now comes the Coleman Fulton Pasture Company and especially answering says that it is the remote warrantor of all of the defendants in this case and owners of the land involved in this litigation and as such here now appears and urges its defense to plaintiff's cause of action and in support of its defense says:

First.

The Coleman Fulton Pasture Company does hereby adopt the answers herein filed by each and every defendant herein in so far as said answers constitute a reply to the plaintiff's cause of action and here now urges each and every defense set up in said several answers the same as though they were here repeated.

Second.

Further specially answering herein this defendant especially adopts each and every allegation contained in the First amended original answer of the defendant Coleman Fulton Pasture Company filed herein on January 4th, 1915, and here now urges
50 each and every defense of defendant's cause of action therein stated the same as though they were here again repeated.

KLEBERG & STAYTON,
TEMPLETON, BROOKS, NAPIER & OGDEN,
Attorneys for Coleman Fulton Pasture Company, Warrantor.

Indorsements: No. D. L. 8. Houston Pasture Co. vs. Alice State Bank. Answer of Coleman Fulton Pasture Co. Remote Warrantor. Filed May 25, 1915. L. C. Masterson, Clerk, by J. A. Mount, Deputy.

Plaintiff's First Supplemental Petition.

Filed May 25, 1915.

In the District Court of the United States, Southern District of Texas, at Corpus Christi.

At Law.

D. L., No. 8.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

Now comes the plaintiff, and with leave of the Court files this its first supplemental petition, in answer to the various pleas of limitation set up by the defendants in their pleadings, and for such says:

First.

Plaintiff shows that it holds one-eighth of the land in controversy in this suit by written transfer from the heirs of Margaret Lee Houston, who married Mr. Williams. Plaintiff shows that 51 the said Margaret L. Houston was married to said Williams on October 17, 1866, and that the said Margaret L. Williams lived until November 12, 1906; that the husband of the said Margaret L. Williams, the said Williams, died on May 21, 1899. That, therefore, from October 17, 1866, to the twenty-first day of May, 1899, no limitations would run against the one-eighth interest owned by the said Mrs. Margaret L. Williams.

Second.

Plaintiff shows that it holds one-eighth of the land in controversy in this suit by a written transfer from Mary W. Morrow, who was one of the eight children of General Sam Houston. That the said Mary W. Morrow was married on April 11, 1871, to J. S. Morrow, and that the said J. S. Morrow died on the 20th day of May, 1885, and said Mrs. Mary W. Morrow is still living. Therefore, the said one-eighth interest owned by Mary W. Morrow was under the disability of coverture from April 11, 1871, to May 20, 1885.

Third.

That plaintiff owns by written transfer from Mrs. Nettie Bringhart, one-eighth of the land in controversy. Plaintiff shows that

the said Nettie Bringhurst was married to W. L. Bringhurst on the 28th day of Feb., 1877, and that she is still living. That the said W. L. Bringhurst died on February 18, 1913. That, therefore, the one-eighth interest owned by Mrs. Nettie Bringhurst was under the disability of coverture from the date of the marriage in 1877 to the date of his death in 1913.

Wherefore, plaintiff says that as to the three-eighths interest in the land sued for, owned by the respective heirs of General Sam Houston as above enumerated, the same were under the disability of coverture between the dates of the respective marriages and deaths, as above enumerated and that for that reason no limitations would run against the same for the respective periods of time enumerated above.

W. D. GORDON,
THOS. J. BATEN,
W. H. BALDWIN,
H. M. HOLDEN,
Attorneys for Plaintiffs.

Indorsements: D. L. No. 8. Houston Pasture Company vs. Alice State Bank, et al. Plaintiff's First Supplemental Petition. Filed May 25, 1915. L. C. Masterson, Clerk, by J. A. Mount, Deputy.

First Supplemental Answer of Defendants, Coleman Fulton Pasture Co.

Filed May 25, 1915.

In the District Court of the United States for the Southern District of Texas, at Corpus Christi.

D. L., No. 8.

HOUSTON PASTURE COMPANY
VS.
ALICE STATE BANK.

Now comes the defendant Coleman Fulton Pasture Company and with leave of the Court first had and obtained files this its first supplemental answer and in reply to plaintiff's first supplemental petition says:

First.

This defendant demurs to said first supplemental petition and says that the same is insufficient in law and states no cause of action against this defendant whereof defendant prays judgment of the court.

58

Second.

In case the foregoing demurrer is overruled then comes the defendant and denies all and singular, each and every allegation con-

tained in each and every paragraph of said plaintiff's first supplemental petition.

Third.

Further specially answering herein this defendant denies the cove-ture of Margaret L. Williams, nee Houston, for the period of time mentioned and denies that limitation did not run against the interest claimed by Margaret L. Williams, for the period of time mentioned in paragraph one.

Fourth.

Further specially answering herein this defendant denies the cove-ture of Mary M. Morrow, Nee Houston, for the period of time mentioned and denies that limitation did not run against the interest claimed by Mary W. Morrow, for the period of time as mentioned in Paragraph Two.

Fifth.

Further specially answering herein this defendant denies the cove-ture of Mrs. Nettie Bhinghurst, nee Houston, for the period of time mentioned and denies that limitation did not run against the interest claimed by Mrs. Nettie Bringhurst for the period of time as mentioned in Paragraph Three.

Sixth.

Defendant denies that the plaintiff is entitled to the relief as set up in the last paragraph of his petition.

KLEBERG & STAYTON.

TEMPLETON BROOKS, NAPIER & OGDEN.

Indorsements: No. D. L. 8. Houston Pasture Co. vs. Alice State Bank. Coleman Fulton Pasture Co., Defendants, First Supplemental Answer. Filed May 25, 1915. L. C. Masterson, Clerk, by J. A. Mount, Deputy.

54 *First Supplemental Answer of Defendants Gibson, Schalteig, T. N. Pullen, Harrell, Harrell, Sivers, Widergren, and Anderson.*

Filed May 25, 1915.

In the District Court of the United States for the Southern District of Texas, at Corpus Christi.

D. L., No. 8.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

Now comes the defendants W. J. Gibson, W. E. Schalteig, T. N. Pullin, John A. Harrell, A. A. Harrell, Alfred Sivers, Frank L.

Widergren and John A. Anderson, and with leave of the court first had and obtained file this their first supplemental answer and in reply to plaintiff's first supplemental petition say:

First.

These defendants demur to said first supplemental petition and say that the same is insufficient in law and states no cause of action against these defendants whereof defendants pray judgment of the court.

Second.

In case the foregoing demurrer is overruled then come the defendants and deny all and singular, each and every allegation contained in each and every paragraph of said plaintiff's first supplemental petition.

Third.

55 Further specially answering herein these defendants deny the coe-ture of Margaret L. Williams, née Houston, for the period of time mentioned and deny that limitation did not run against the interest claimed by Margaret L. Williams, for the period of time mentioned in paragraph One.

Fourth.

Further specially answering herein these defendants deny the coe-ture of Mary W. Morrow, née Houston, for the period of time mentioned and deny that limitation did not run against the interest claimed by Mary W. Morrow, for the period of time as mentioned in paragraph Two.

Fifth.

Further specially answering herein these defendants deny the coe-ture of Mrs. Nettie Bringhurst, née Houston, for the period of time mentioned and deny that limitation did not run against the interest claimed by Mrs. Nettie Bringhurst for the period of time as mentioned in Paragraph Three.

Sixth.

Defendants deny that the plaintiff is entitled to the relief as set up in the last paragraph of his petition.

J. C. HOUTS,

Attorneys for said Defendants.

Indorsements: D. L. No. 8. Houston Pasture Co. vs. Alice State Bank et al. First Supplemental Answer of Defendants Gibbons, Schalsteig, Pullin, Harrold, Widergren and Anderson and Sivers. Filed May 25, 1915. L. C. Masterson, Clerk, by J. A. Mount, Deputy.

56 *First Supplemental Answer of Defendants E. Cubage and
Detlef Hebbel.*

Filed May 25, 1915.

In the District Court of the United States for the Southern District
of Texas, at Corpus Christi.

D. L., No. 8.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

Now come E. Cubage and Detlef Hebbel, defendants and with
leave of the Court first had and obtained file this their first supple-
mental answer in reply to plaintiff's first supplemental petition and
say:

First.

These defendants demur generally to said first supplemental peti-
tion and say that the same is insufficient in law and states no cause
of action against these defendants, and of which they pray judg-
ment of the court.

Second.

In case the foregoing demurrer is overruled then come the said
defendants and deny all and singular each and every allegation
contained in each and every paragraph of plaintiff's first supple-
mental petition.

Third.

Further specially answering herein, if required to answer fur-
ther, these defendants hereby adopt in toto the first supplemental
answer of the defendants W. J. Gibson, W. E. Schmalsteig,
57 T. N. Pullin, John A. Harrell, A. A. Harrell, Alfred Siver,
Frank Widergren, and urge the same as fully as if said
answer was recited in full herein.

KLEBERG & STAYTON,

Attorneys for Defendants Cubage and Hebbel.

Indorsements: D. L. No. 8. Houston Pasture Company vs. Alice
State Bank, et al. First Supplemental Answer of Defendants E.
Cubage and Detlef Hebbel. Filed May 25, 1915. L. C. Masterson,
Clerk. By J. A. Mount, Deputy.

Defendant's Coleman-Fulton Pasture Co. Trial Amendment.

Filed May 28, 1915.

In the United States District Court for the Southern District of Texas, at Corpus Christi.

No. D. L., 8.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et al.

Now comes the defendant Coleman-Fulton Pasture Company and with leave of the court first had and obtained files this its trial amendment and in support of same says

First.

This defendants disclaims as owner any interest in and to any part of the land in controversy save and except 153.64 acres lying and being situated in the Northeast corner of said Sam Houston Survey which is bound upon the North by the North line of the Houston Survey, on the East by the East line of the Houston Survey and on the Southwest by the property owned by W. J. Gibson and T. 58 N. Pullin, as shown by deeds to W. J. Gibson and T. N. Pullin on file in this cause, said 153.64 acres now owned and claimed by this defendant being in a triangular form.

Second.

In support of the defendant's title to said 153.64 acres this defendant here now pleads the three, five and ten years Statutes of Limitation as the same have been heretofore plead in the original answer of the defendant Coleman-Fulton Pasture Company filed January 4th, 1915, and does hereby now in all things adopt said original answer heretofore filed by the Coleman-Fulton Pasture Company in each and every respect, the same as though the defenses therein alleged are again here stated, in so far as the same establishes the title of the defendant Coleman-Fulton Pasture Company to the land hereinabove described.

Third.

As to all of the other land described in plaintiff's petition other than the 153.64 acres hereinabove described this defendant is defending upon its warranty.

KLEBERG & STAYTON,
TEMPLETON, BROOKS, NAPIER &
OGDEN,

Atty's — Deft.

Indorsements: No. D. L. 8. Houston Pasture Co. vs. Alice State Bank et al. Defendant's Coleman Fulton Pasture Co. Trial Amendment. Filed May 28, 1915. L. C. Masterson, Clerk.

59 *Special Charge No. 1 by Defendants.*

Filed May 28, 1915.

In the United States District Court for the Southern District of Texas,
Corpus Christi Division.

D. L., No. 8.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

Defendants request the Court to give the jury the following special charge:

Gentlemen of the Jury: The Statutes of this state provide that every suit to be instituted to recover real estate, as against any person in peaceable and adverse possession thereof under title, shall be instituted within three years next after the cause of action shall have accrued, and not afterward. In this connection you are instructed that the instruments constituting the chain of title of the defendants and introduced in evidence by them are sufficient to show such title.

"Peaceable possession" is such as is continuous and not interrupted by adverse suit to recover the estate.

"Adverse possession" is an actual and visible appropriation of the land commenced and continuing under a claim of right inconsistent with and hostile to the claim of another.

Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them.

60 In this connection you are instructed that the instruments constituting the defendants' chain of title and introduced in evidence by them are sufficient to show such privity of the estate between defendants and those under whom they claim.

Therefore you are instructed that if you believe from the evidence that the defendants, and those under whom they claim, have had peaceable and adverse possession of the Sam Houston Survey in controversy under title, for a period of three consecutive years at any time between June 22, 1874, and May 30, 1914, then you should return a verdict for the defendants, unless you find for plaintiff under other instructions given you.

J. C. HOUTS,
M. A. CHILDERS,
KLEBERG & STAYTON,
TEMPLETON, BROOKS, NAPIER &
OGDEN,
JAS. B. WELLS &
J. C. TODD,

Attorneys for Defendants.

Indorsements: Houston P. Co. vs. Alice State B'k et al. Sp1 Chg. No. 1, by Def'ts. Refused, Burns, Judge. Filed May 28, 1915. L. C. Masterson, Clerk.

Special Charge No. 2 by Defendant.

Filed May 28, 1915.

In the United States District Court for the Southern District of Texas, Corpus Christi Division.

D. L., No. 8.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et al.

Defendants request the Court to give the jury the following special charge:

Gentlemen of the Jury: The statutes of this state provide
61 that every suit to be instituted to recover real estate, as against any person in peaceable and adverse possession thereof under color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterward.

In this connection you are instructed that by "Color of title" is meant a consecutive chain of such transfer down to such person in possession, without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty; or when the party in possession shall hold the same by certificate of headright, land warrant, or land scrip, with a chain of transfer down to him in possession.

In this connection you are further instructed that the instruments constituting the chain of title of the defendants are sufficient to show such color of title.

"Peaceable possession" is such as is continuous and not interrupted by adverse suit to recover the estate.

"Adverse possession" is an actual and visible appropriation of the land commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them. In this connection you are instructed that the instruments constituting the chain of title of defendants and introduced in evidence by them are sufficient to show such privity of estate between them and those under whom they claim.

Therefore, you are instructed that if you believe from the evidence that the defendants, and those under whom they claim, have and peaceable and adverse possession of the Sam Houston Survey in con-

trovercy under color of title, for a period of three consecutive years
 62 at any time between June 22, 1874, and May 30, 1914, then
 you should return a verdict for defendants, unless you find
 for plaintiff under other instructions given you.

J. C. HOUTS,
 M. A. CHILDERS,
 J. C. TODD,
 KLEBERG & STAYTON,
 TEMPLETON, BROOKS, NAPIER &
 OGDEN,
 JAS. B. WELLS,
Attorneys for Defendants.

Indorsements: Houston P. Co. vs. Alice State B'k et al. Sp'l
 Chg. No. 2 by def't. Refused: Burns, Judge. Filed May 28, 1915.
 L. C. Masterson, Clerk.

Special Charge No. 3 by Defendants.

Filed May 28, 1915.

In the United States District Court for the Southern District of
 Texas, Corpus Christi Division.

D. L., No. 8.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

Defendants request the Court to give the jury the following special
 charge:

Gentlemen of the Jury: The Statutes of this State provide that
 every suit to be instituted to recover real estate, as against any person
 having peaceable and adverse possession thereof, cultivating, using
 or enjoying the same, and paying taxes thereon, if any, and claiming
 under deed or deeds duly registered, shall be instituted within five years
 next after the cause of action shall have accrued, and not afterward.

63 In this connection you are instructed that by the term "deed
 or deeds duly registered" is meant such deeds as those consti-
 tuting the chain of title of the defendants that have been in-
 troduced by them, and which have been recorded in the deed records
 of the County in which the land thereby conveyed is situated.

"Peaceable possession" is such as is continuous and not interrupted
 by adverse suit to recover the estate.

"Adverse possession" is an actual and visible appropriation of the
 land commenced and continuing under a claim of right in-
 consistent with and hostile to the claim of another.

Peaceable and adverse possession need not be continued in the

same person, but when held by different persons successively there must be a privity of estate between them.

In this connection you are instructed that the deeds constituting the chain of title of the defendants and introduced in evidence by them show such privity of estate between them and those under whom they claim.

Therefore, if you believe from the evidence that the defendants, and those under whom they claim, have had peaceable and adverse possession of the Sam Houston Survey in controversy, cultivating, using and enjoying the same, and paying taxes thereon, and claiming under a deed or deeds duly registered, for a period of five consecutive years at any time between the 26th day of August, 1879, and the 30th day of May, 1914, then you should return a verdict for the defendants unless you find for the plaintiff under other instructions given you.

J. C. HOUTS,
M. A. CHILDERS,
JNO. C. TODD,
JAS. B. WELLS,
KLEBERG & STAYTON,
TEMPLETON, BROOKS,
NAPIER & OGDEN,

Attorneys for Defendants.

Indorsements: Houston P. Co. vs. Alice State Bk., et al. Spl. Chg. No. 3. Refused: Burns, Judge. Filed May 28, 1915. L. C. Master-son, Clerk.

64

Special Charge No. 4 by Defendants.

Filed May 28, 1915.

In the United States District Court for the Southern District of Texas, Corpus Christi Division.

D. L., No. 8.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et al.

Defendants request the Court to give to the jury the following special charge:

Gentlemen of the jury: The Statutes of this State provide that any person who has a right of action for the recovery of any land against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward.

"Peaceable possession" is such as is continuous and not interrupted by adverse suit to recover the estate.

"Adverse possession" is an actual and visible appropriation of the land commenced and continuing under a claim of right inconsistent with and hostile to the claim of another.

Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them.

In this connection you are instructed that the deeds constituting the chain of title of the defendants and introduced in evidence by them show such privity of estate between them and those under whom they claim.

Therefore, you are instructed that if you believe from the evidence that the defendants, and those under whom they claim, 65 have had peaceable and adverse possession of the Sam Houston Survey in controversy, cultivating, using or enjoying the same, for a period of ten consecutive years any any time between June 22nd, 1874, and May 30, 1914, then you should return a verdict for the defendants, unless you find for plaintiffs under other instructions given you.

J. C. HOUTS,
M. A. CHILDERS,
JNO. C. TODD,
JAS. B. WELLS,
KLEBERG & STAYTON,
TEMPLETON, BROOKS,
NAPIER & OGDEN,
Attorneys for Defendants.

Indorsements: Houston P. Co. vs. Alice State Bk. et al., Spl. Chg. No. 4 Refused: Burns, Judge. Filed May 28, 1915. L. C. Master-son, Clerk.

Defendant's Requested Charge No. 5.

Filed May 28, 1915.

In the United States District Court for the Southern District of Texas at Corpus Christi.

D. L., No. 8.

HOUSTON PASTURE CO.
vs.
ALICE STATE BANK.

To said Honorable Court:

Defendant Coleman Fulton Pasture Company requests the court to give the following charge to the Jury:

Gentlemen of the Jury: You are instructed that upon the issue of adverse possession of land under a defense of title by limitation

06 it is not necessary that the proof show the land to have been enclosed on every side by an artificial enclosure, but, as regards enclosure, a natural barrier in part may be shown to have been utilized, provided it be of such a character as, in connection the fence, will constitute a substantial enclosure of the land, and provided it be sufficient to indicate dominion over the premises and give notoriety to the claim of possession and title. The natural barriers in such case must be so used in connection with the artificial barriers as to indicate that they are relied on by the user thereof to enclose the land and to keep out persons desiring access thereto.

TEMPLETON, BROOKS,
NAPIER & OGDEN,
KLEBERG & STAYTON,
Attorneys for said Defendants.

All other defendants join in the above request.

J. C. HOUTS,
JONES AND CHILDERS,
JAS. B. WELLS,
J. C. TODD, *Their Attorneys.*

Indorsements: Defendant's Requested Charge No. 5. Refused, Burns, Judge. Filed May 28, 1915. L. C. Masterson, Clerk.

Defendant's Requested Charge No. 6.

Filed May 28, 1915.

In the United States District Court for the Southern District of Texas at Corpus Christi.

D. L., No. 8.

HOUSTON PASTURE CO.

VS.

ALICE STATE BANK.

To said Honorable Court:

Defendant Coleman Fulton Pasture Company requests the Court to give the following charge to the Jury:

07 Gentlemen of the Jury: You are instructed that under the defense of limitation of five years it is not necessary that the proof show the land to have been fenced, but it is sufficient if the person in possession thereof and his predecessors with whom he has privity of estate, have had peaceable and adverse possession thereof, cultivating, using or enjoying the same or some part thereof, paying taxes thereon and claiming under deed or deeds duly registered for five years continuously at some time before the institution of this suit.

TEMPLETON, BROOKS,
NAPIER & OGDEN,
KLEBERG & STAYTON,
Attorneys for said Defendant.

All other defendants join in the above request.

J. C. HOUT,
JONES & CHILDERS,
JAMES B. WELLS,
J. C. TODD, *Their Attorneys.*

Indorsements: Requested Charge No. 6. Refused: Burns, Judge.
Filed May 28, 1915. L. C. Masterson, Clerk.

Defendants' Requested Charge No. 7.

Filed May 28, 1915.

In the United States District Court for the Southern District of
Texas at Corpus Christi.

D. L., No. 8.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

Defendants request the Court to submit the following charge to
the jury:

68 Gentlemen of the Jury: You are instructed that plaintiff
has not acquired the undivided one-eighth interest of Temple
Houston in the estate of Sam Houston; and, therefore, as to an un-
divided one-eighth interest of the land in controversy you will return
a verdict for defendants.

TEMPLETON, BROOKS,
NAPIER & OGDEN,
JONES & CHILDERS,
J. C. HOUTS,
KLEBERG & STAYTON,
JAMES B. WELLS,
SUTTLE & TODD,

Attorneys for said Defendants.

Indorsements: Defendants' Requested Charge No. 7. Refused:
Burns, Judge. Filed May 28, 1915. L. C. Masterson, Clerk.

Defendants' Requested Charge No. 8.

Filed May 28, 1915.

In the District Court of the United States for the Southern District
of Texas, Sitting at Corpus Christi.

No. 8, L. D.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et al.

The defendants request the court to give the jury the following special charge, to-wit:

Gentlemen of the Jury: If you believe from the evidence that the land in controversy was by defendants or their predecessors and privies in title, inclosed by fence on three sides, and bounded by water on the other side, and that the water was of such nature and
60 depth as to constitute a barrier on such fourth side, then this would constitute a sufficient enclosure under the defense of ten years limitation. And if you find that such enclosure was peaceable, adverse and continuously maintained by such parties, or any of them, for ten years at any time prior to the bringing of this suit, and that during such time they, or any of them, cultivated, used or enjoyed such land you will find in favor of defendants, unless you find that during such particular ten years some of the heirs of Sam Houston were married women with husbands living, in which latter case you will be governed in your findings by the court's charge on the effect of marriage of a woman upon the running of limitation.

KLEBERG & STAYTON,
TEMPLETON, BROOKS,
NAPIER & OGDEN,
J. C. HOUTS,
JONES & CHILDERS,
JAMES B. WELLS,
SUTTLE & TODD,

Attorneys for Defendants.

Indorsements: Defendants' Requested Charge No. 8. Refused:
Burns, Judge. Filed May 28, 1915. L. C. Masterson, Clerk.

Defendants' Requested Charge No. 9.

Filed May 28, 1915.

In the District Court of the United States for the Southern District of Texas, Sitting at Corpus Christi.

D. L., No. 8.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

The defendants request the court to give the jury the following special charge, to-wit:

70 Gentlemen of the Jury: You are further instructed that limitation, as in the court's charge defined, could not run against a married woman with living husband before July 29, 1896, unless it began to run before she was married, in which latter case it could continue to run against her. You are further instructed that limitation could run against a married woman after July 29, 1896.

If you find that limitation could not run under this charge as to some one or more of the heirs of Sam Houston, you will not find in favor of the defendants on the issue of limitation as to the proportionate interest in said land claimed by such heir or heirs, keeping in mind that they each claim an undivided one-eighth of any estate left by their father.

TEMPLETON, BROOKS,
NAPIER & OGDEN,
KLEBERG & STAYTON,
J. C. HOUTS,
JAMES B. WELLS,
JONES & CHILDERS,
BUTTLE & TODD,

Attorneys for Defendants.

Indorsements: Defendants' Requested Charge No. 9. Refused:
Burns, Judge. Filed May 28, 1915. L. C. Masterson, Clerk.

Defendants' Requested Charge No. 10.

Filed May 28, 1915.

Suit Pending in the United States District Court for the Southern District of Texas, Sitting at Corpus Christi, Texas.

No. 8, L. D.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

71 The Defendants ask the court to give to the Jury the following special charge, to-wit:

Gentlemen of the Jury:

You are further instructed that the open, visible and notorious exercise of the rights of ownership of land of such a nature and character as to constitute notice to the world of a hostile claim of ownership, by one claiming title to the land under a deed duly registered, is sufficient to constitute the adverse possession required by the five years' statute of limitation, and this is true without regard to whether any, or what part, of the land is actually enclosed, or the character of the enclosure, if any.

TEMPLETON, BROOKS, NAPIER & OGDEN,
KLEBERG & STAYTON,
J. C. HOUT,
JAMES B. WELLS,
JONES & CHILDERS,
SUTTLE & TODD,

Attorneys for Defendants.

Indorsements: Defendants' Requested Charge No. 10. Refused:
Burns, Judge. Filed May 28, 1915. L. C. Masterson, Clerk.

Defendants' Requested Charge No. 11.

Filed May 28, 1915.

No. 8, L. D.

In District Court of the United States for the Southern District of
Texas, Sitting at Corpus Christi.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et al.

72 The defendants request the court to give to the Jury the
following special charge, to-wit:

Gentlemen of the Jury:

If you find from the evidence that the defendant Coleman-Fulton Pasture Company, claiming under a deed duly registered and covering the land in question, entered upon and made improvements on a part thereof, and further enclosed a part thereof by fence, then I charge you that the possession of the Coleman-Fulton Pasture Company extends to the boundaries of the land in question, as shown in the deed. As to the part of the land enclosed and improved it was in actual possession, and as to the part not enclosed it was in constructive possession.

TEMPLETON, BROOKS, NAPIER & OGDEN,
KLEBERG & STAYTON,
J. C. HOUT,
JONES & CHILDERS,
JAMES B. WELLS,
SUTTLE & TODD,

Attorneys for Defendants.

Indorsements: Defendants' Requested Charge No. 11. Refused:
Burns, Judge. Filed May 28, 1915. L. C. Masterson, Clerk.

Defendants' Special Charge No. 12.

Filed May 28, 1915.

In the United States District Court for the Southern District of
Texas, at Corpus Christi.

D. L., No. 8.

HOUSTON PASTURE CO.

vs.

ALICE STATE BANK.

73 To said Honorable Court:

Defendant Coleman-Fulton Pasture Company requests the Court
to give the following charge to the Jury:

Gentlemen of the Jury:

The open and notorious exercise of the right of ownership of land,
of such nature and character as to constitute notice to the world of
a hostile claim of ownership by one claiming title to the land under
a deed, duly registered, is sufficient to constitute the adverse possession
required by the five years' statute of limitations, and this is true
without regard to whether any, or what part, of the land is actually
enclosed or the character of the enclosure, if any.

TEMPLETON, BROOKS, NAPIER & OGDEN,
KLEBERG & STAYTON.

All other defendants join in the above request for the charge above
set out.

J. C. HOUTS,
JONES & CHILDERS,
JAMES B. WELLS,
SUTTLE & TODD,
Their Attorneys.

Indorsements: Defendants' Special Charge No. 12. Refused,
Burns, Judge. Filed May 28, 1915. L. C. Masterson, Clerk.

Special Charge 13, by Defendants.

Filed May 28, 1915.

In the United States District Court for the Southern District of
Texas, Corpus Christi Division.

D. L., No. 8.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et al.

74 Defendants Request the Court to give the Jury the following Special Charge:

Gentlemen of the Jury:

The Deed to the Coleman-Fulton Pasture Company, to the Sam Houston Survey in controversy is the kind of Deed required by the five (5) years' statute of limitations, and was duly registered on June 10th, 1881.

J. C. HOUTS,
M. A. CHILDRESS,
KLEBERG & STAYTON,
TEMPLETON, BROOKS, NAPIER & OGDEN,
JAMES B. WELLS, AND
SUTTLE & TODD,

Attorneys for Defendants.

Indorsements: Spl. Chge. 13 by Defts. Refused: Burns, Judge.
Filed May 28, 1915. L. C. Masterson, Clerk.

Special Charge No. 14, by Defendants.

Filed May 28, 1915.

In the United States District Court for the Southern District of
Texas, Corpus Christi Division.

D. L., No. 8.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et al.

Defendants request the Court to give the Jury the following Special Charge:

Gentlemen of the Jury:

The undisputed evidence shows that the Coleman-Fulton Pasture Company, and those under whom it claims, paid all taxes on

75 the land in controversy claimed by them, as required by the five (5) years' Statute of Limitations.

J. C. HOUTS,
M. A. CHILDERS,
KLEBERG & STAYTON,
TEMPLETON, BROOKS, NAPIER & OGDEN,
JAMES B. WELLS, AND
SUTTLE & TODD,

Attorneys for Defendants.

Indorsements: Spl. Chg. 14, by defts. Refused. Burns, Judge.
Filed May 28, 1915. L. C. Masterson, Clerk.

Special Charge No. 15, by Defendants.

Filed May 28, 1915.

In the United States District Court for the Southern District of Texas, Corpus Christi Division.

D. L., No. 8.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et al.

Defendants request the Court to give the Jury the following Special Charge:

Gentlemen of the Jury:

The undisputed evidence shows that the possession (if any) of the Coleman-Fulton Pasture Company, and those under whom it claims, of the land in controversy claimed by them, was the peaceable possession, required by the Statute of Five (5) years' Statute of Limitations.

J. C. HOUTS,
M. A. CHILDERS,
KLEBERG & STAYTON,
TEMPLETON, BROOKS, NAPIER & OGDEN,
JAMES B. WELLS, AND
SUTTLE & TODD,

Attorneys for Defendants.

76 Indorsements: Spl. Chg. 15, by defts. Refused: Burns, Judge. Filed May 28, 1915. L. C. Masterson, Clerk.

Special Charge No. 16, by Defendants.

Filed May 28, 1915.

In the United States District Court for the Southern District of Texas, Corpus Christi Division.

D. L., No. 8.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et al.

Defendants request the Court to give the Jury the following Special Charge:

Gentlemen of the Jury:

The undisputed evidence shows that the possession (if any) of the Coleman-Fulton Pasture Company, and those under whom it claims, of the land in controversy claimed by them, was commenced and continued under a claim of right inconsistent with and hostile to the claim of another, as required by the five (5) years' Statute of Limitations: and you are instructed that their possession (if any) of the land in controversy claimed by them, was the adverse possession required by the said Statute, if it was of such character as to amount to an actual and visible appropriation of the said land. It was not necessary for the land, or any part thereof, to be actually enclosed to constitute such appropriation; it is sufficient that if the land was actually used and occupied, for the five (5) years required by the Statute, in such way as to make such use and occupation visible and notorious and to constitute notice to the world of the hostile claim to the land of those so using and occupying the same.

77

J. C. HOUTS,
M. A. CHILDERS,
KLEBERG & STAYTON,
TEMPLETON, BROOKS, NAPIER & OGDEN,
JAMES B. WELLS, AND
SUTTLE & TODD,

Attorneys for Defendants.

Indorsements: Spl. Chg. 16, by defts. Refused: Burns, Judge.
Filed May 28, 1915. L. C. Masterson, Clerk.

Special Charge No. 17, by Defendants.

Filed May 28, 1915.

In the United States District Court for the Southern District of Texas,
Corpus Christi Division.

D. L., No. 8.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

Defendants request the Court to give the Jury the following
Special Charge:

Gentlemen of the Jury:

Possession of that part of the Sam Houston Survey in controversy, that is included within the Cruz Pasture, by the Coleman Fulton Pasture Company, and those under whom it claims and also its assignees, from the time same was inclosed in said Cruz Pasture, was the peaceable and adverse possession required by the Five (5) Year Statutes of Limitations.

78 Such peaceable and adverse possession of that part of such Survey enclosed in the Cruz Pasture constituted the peaceable and adverse possession of the balance of the said Survey that is required by the Five (5) Years Statute of Limitations.

J. C. HOUTS,
M. A. CHILDERS,
KLEBERG & STAYTON,
TEMPLETON, BROOKS,
NAPIER & OGDEN,
JAMES B. WELLS, AND
SUTTLE & TODD,

Attorneys for Defendants.

Indorsements: Spl. Chg. 17, by defts. Refused: Burns, Judge.
Filed May 28, 1915. L. C. Masterson, Clerk.

Special Charge No. 18 by Defendants.

Filed May 28, 1915.

In the United States District Court for the Southern District of
Texas, Corpus Christi Division.

D. L., No. 8.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et al.

Defendants request the Court to give the Jury the following
Special Charge:

Gentlemen of the Jury:

Possession of that part of the Sam Houston Survey in controversy
that is included within the Cruz Pasture by the Coleman Fulton
Pasture Company, and those under whom it claims and also
70 its assignees, from the time same was inclosed in said Cruz
Pasture, was the peaceable and adverse possession required
by the Five (5) Years Statutes of Limitations.

J. C. HOUTS,
M. A. CHILDERS,
KLEBERG & STAYTON,
TEMPLETON, BROOKS,
NAPIER & OGDEN,
JAMES B. WELLS, AND
SUTTLE & TODD,

Attorneys for Defendants.

Indorsements: Spl. Chg. 18, by defts. Refused: Burns, Judge.
Filed May 28, 1915. L. C. Masterson, Clerk.

Special Charge No. 19, by Defendants.

Filed May 28, 1915.

In the United States District Court for the Southern District of
Texas, Corpus Christi Division.

D. L., No. 8.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et al.

Defendants request the Court to give the Jury the following Special
Charge:

Gentlemen of the Jury:

The possession of that part of the Sam Houston Survey in controversy that was enclosed by the fence built by Tumlinson for the Coleman Fulton Pasture Company in 1905, was the peaceable and adverse possession of all that part of said Survey included within the enclosure constructed by the said Tumlinson from the time the said enclosure was completed.

J. C. HOUTS,
M. A. CHILDERS,
KLEBERG & STAYTON,
TEMPLETON, BROOKS,
NAPIER & OGDEN,
JAMES B. WELLS, AND
SUTTLE & TODD,

Attorneys for Defendants.

Indorsements: Spl. Chg. No. 19, by defts. Refused: Burns, Judge.
Filed May 28, 1915. L. C. Masterson, Clerk.

Court's Charge.

In the United States District Court for the Southern District of Texas, Corpus Christi Division.

D. L., No. 8.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

Court: Gentlemen of the Jury:

You are to be relieved of all difficulties in this case. It occurs to the Court that it is a question of Law, rather than Fact, and I do not feel that the Court ought to shirk the responsibility, or attempt to divide the same with the Jury. In other words, you try the facts, and the Court hands down the law of the case, for the time being, at any rate.

In this case the Court reaches the conclusion, and you are advised that by reason of the Special Act of the Legislature passed July 22, 1870, being "An Act for the relief of the heirs of General Sam Houston," and in pursuance of the location and survey of the land in question and patent by the Governor of the State of Texas to the heirs of General Sam Houston, and to their heirs and their assigns, that the legal title to the 1,280 acres of land in question is in the plaintiff in this case, and the Plaintiff is entitled to recover all of said 1,280 acres of land, less such parts thereof, as may have been acquired by one or more of the defendants by reason of the Statute of Limitation.

Therefore, thus announcing the view that I have, the Counsel in

this case, by agreement and acting under the views of the Court as announced, have prepared this form of verdict for your adoption and signature.

I will say to you, that the attitude of the Court in disposing of the case is directed and controlled by a case decided by the Circuit Court of Appeals of this Circuit, in October, 1905, and reported in 140 Federal Reporter, the style of the case being Hyde vs. McFadden. The land in litigation in that case—it being a case of trespass to try title—is situated near Beaumont, in Jefferson County, Texas. The case was reversed and rendered — that was the effect of the holding of the Circuit Court of Appeals. In that case there was about seven miles of water front. In this case there is water front of fourteen miles, and the Court of Appeals for this Circuit, by whose judgment I am guided and controlled, in the discharge of my duty—the water front is held by that Court not to be such a Barrier as would put in motion the Statutes of Limitation. Therefore, the plaintiff in this case should recover such part of the Houston Survey, which has not been defeated by adverse possession under the Statutes of Limitation of our State. It follows that the land, perhaps about one-third thereof, heretofore described as being in the "Crus Pasture," having no water front as a Barrier, but being entirely enclosed for the requisite length of time under the Statutes of Limitation, 82 should be awarded to the several defendants claiming the same.

The balance of the survey, not having been enclosed, according to the testimony offered by the defendants, to-wit, Mr. Tumlinson, until April, 1905,—this suit being filed in May, 1914,—the defendants are not entitled to recover under their pleas of adverse possession, the land claimed by the defendants and situated in what is known as the "Pistola Pasture" should be awarded to the Plaintiff, the Houston Pasture Company, by reason of the failure of the defendants to make good their pleas, except that part of said survey claimed by defendant, Gibson, amounting to 280.12 acres, and that part of said survey claimed by the defendant, The Coleman-Fulton Pasture Company, having the form of a triangle and containing 153.64 acres. Under the evidence it appears that that particular tract of land was enclosed under separate fence, erected in the year 1903, and that said defendant has been in possession thereof sufficiently long to acquire title against the Plaintiff.

The form of verdict has been prepared by Counsel, and agreed upon as correctly reflecting the facts, as controlled by the Court's view of the law, and I will ask that one of your members, as foreman, kindly sign the verdict.

Endorsed: D. L. No. 8, Houston Pasture Co. vs. Alice State Bank, et al. Court's Charge. Filed 2 day of July, 1915. L. C. Masterson, Clerk, by J. A. Mount, Deputy.

Verdict.

HOUSTON PASTURE Co.

vs.

ALICE STATE BANK et al.

We the jury find for the plaintiff against the Alice State Bank for the 160 acres described in its answer and against Frank
 88 L. Widergren and John A. Anderson for the 160 acres described in their joint answer, and against T. N. Pullin for the 166-80/100 acres described in his answer and we find in favor of plaintiff against said Widergren & Anderson for rent of said land the sum of \$315, and in their favor against the plaintiff for improvements in the sum of \$2,235, and we find in favor of plaintiff against said Pullen for rent the sum of \$400, and in his favor against plaintiff for improvements in the sum of \$2,900. We also find against plaintiff and in favor of all other defendants as to all the land in controversy, other than that recovered by plaintiff above mentioned.

And we find in favor of the defendants Widergren & Anderson and Pullen against their warrantors and in favor of each of such warrantors against each of his preceding warrantors for the amounts agreed upon.

J. A. HILL, *Foreman.*

Endorsed: No. 8 D. L., Houston Pasture Co. vs. Alice State Bank, et al. Verdict. Filed May 28, 1915. L. C. Masterson, Clerk.

Final Judgment.

D. L., No. 8.

In the United States District Court for the Southern District of Texas, Corpus Christi Division.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

On the 25th day of May, A. D. 1915, at a regular term of this court, came on to be heard the above numbered and entitled cause, and then came the plaintiff by its attorneys and announced
 84 ready for trial, and then came defendants, Alice State Bank by its attorney, the defendants W. E. Schmalsteig, W. J. Gibson, T. N. Pullin, John A. Harrell, A. A. Harrell, Frank L. Widergren and John A. Anderson and Alfred Sivers, by and through their attorneys, D. W. Martin by and through his attorneys, and Coleman-Fulton Pasture Company by and through its attorneys, and announced ready for trial; and the defendants W. M. Spessard, Wm. Truax duly cited to appear and answer herein, having filed an an-

swer herein, failed to appear; and then came the following defendants, impleaded herein as warrantors, to-wit: Coleman-Fulton Pasture Company, J. D. Cook, A. A. Harrell, Detlef Hebbel, E. Cubage, J. C. Dougherty, J. W. Cook, S. J. Tipton, and W. F. Traxler, by and through their attorneys, and announced ready for trial; and the defendants J. P. McDowell, Martha H. McDowell and H. McDowell and C. L. Vickers, although duly cited failed to appear and answer herein.

And the defendants, W. L. Dusenbury, Martin T. Yates, George Brown, E. O. Sanders, C. W. Darnell, Catherin Darnell, R. G. Sutton, Chas. G. Nelson and all other defendants, if any, not herein above mentioned came not and upon motion duly made in open court by their respective impleaders it is ordered that said defendants so failing to answer herein and each of them are hereby dismissed from this cause of action and it is ordered that their respective impleaders pay the costs in this behalf expended, for which let execution issue.

And then came a jury of twelve good and lawful men, to-wit: J. A. Hill, foreman, and eleven others, who, being duly impaneled and sworn, and after hearing the pleadings and the evidence under the direction of the court, returned into open court on the 28th day of May, A. D. 1915, the following verdict, to-wit:

"We the jury find for the plaintiff against the Alice State Bank for the 160 acres described in its answer and against Frank L. Widergren and John A. Anderson for the 160 acres described in their joint answer, and against T. N. Pullin for the 166-8/100 acres described in his answer, and we find in favor of plaintiff against said Widergren and Anderson for rent of said land the sum of \$315—and in their favor against the plaintiff for improvements in the sum of \$2,235. And we find in favor of plaintiff against said Pullin for rent the sum of \$400, and in his favor against plaintiff for improvements in the sum of \$2,900. We also find against plaintiff and in favor of all other defendants as to all the land in controversy, other than that recovered by plaintiff above mentioned.

"And we find in favor of the defendants Widergren & Anderson and Pullin against their warrantors and in favor of each of such warrantors against each of his preceding warrantors for the amount agreed upon.

"J. A. HILL, Foreman."

It is therefore ordered, adjudged and decreed by the Court this the 28th day of May, A. D. 1915, that the plaintiff, Houston Pasture Company, do have and recover of and from the defendants the following described property, to-wit:

N. E. $\frac{1}{4}$ of Section No. 41 of the George H. Paul Subdivision of the Coleman-Fulton Pasture Company lands South of Taft, according to a plat duly recorded in the Plat Records of San Patricio County, Texas, for which it may have its writ of possession.

And it appearing to the Court that all of the defendants, except the Alice State Bank, have filed a disclaimer to the aforesaid land,

it is ordered that plaintiff recover against defendant, Alice State Bank, only, its cost in this behalf incurred, for which let execution issue.

That the plaintiff, Houston Pasture Company, do have
86 and recover of and from the defendants the following described property, to-wit:

166.08 acres off of the East side of Section No. 56 of the George H. Paul Subdivision of the Coleman-Fulton Pasture Company lands South of Taft, according to a plat duly recorded in the Plat Records of San Patricio County, Texas, said 166.08 acres being all that portion of said Section 56 lying East of the land recovered herein by W. J. Gibson and South of the land recovered herein by Coleman-Fulton Pasture Company, for which it may have its writ of possession.

And it appearing to the Court that all of the defendants, except T. N. Pullin, have filed a disclaimer to this land, it is ordered that plaintiff recover against defendant T. N. Pullin only, its costs in this behalf incurred, for which let execution issue.

That the plaintiff, Houston Pasture Company, do have and recover of and from the defendants the following described property, to-wit: S. E. $\frac{1}{4}$ of Section No. 41 of the George H. Paul Subdivision of the Coleman-Fulton Pasture Company lands South of Taft, according to a plat duly recorded in the Plat Records of San Patricio County, Texas, for which it may have its writ of possession.

And it appearing to the Court that all of the defendants, except Widergren and Anderson, have filed a disclaimer as to this land, it is ordered that plaintiff recover against defendants Frank L. Widergren and John A. Anderson only, its costs in this behalf incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the defendants, Frank L. Widergren and John A. Anderson, do have and recover of and from the plaintiff the sum of \$1,920.00, being the excess value of the improvements made in good faith upon the lands recovered by plaintiff from said defendants, over the
87 estimated value of the use, occupation and damage to the land occupied by said Widergren and Anderson, and to which amount the value of said land was actually increased thereby.

It is further ordered, adjudged and decreed by the Court that the defendant, T. N. Pullin do have and recover of and from the plaintiff the sum of \$2,500.00, being the excess in value of the improvements made in good faith upon the land recovered by the plaintiff from the said defendant, over and above the estimated value of the use, occupation and damage to the land occupied by the said T. N. Pullin, and to which amount the value of said land was actually increased thereby.

It is further ordered, adjudged and decreed by the Court that as to the defendant, Coleman-Fulton Pasture Company, the plaintiff take nothing and that the defendant Coleman-Fulton Pasture Company be permitted to go hence without day and recover against plaintiff all costs in this behalf incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that defendant, Coleman-Fulton Pasture Company, do have and recover of and from the plaintiff, Houston Pasture Company, the following described property, to-wit:

153.84 acres out of the Northeast corner of the Sam Houston Survey, said land being in a triangular form and bounded on the North by the North line of the Houston Survey, on the East by the East line of the Houston Survey, and on the Southwest by the lands described herein, and recovered herein by the defendant, W. J. Gibson, and by the plaintiff from the defendant T. N. Pullin; and the title to said property is hereby vested in the said Coleman-Fulton Pasture Company, for which it may have its writ of possession and against plaintiff all costs in this behalf expended, for which let execution issue.

It is further ordered, adjudged and decreed by the Court 88 that as to the defendant, W. J. Gibson, the plaintiff, Houston Pasture Company, take nothing and that the defendant W. J. Gibson, be permitted to go hence without day, and that he recover against plaintiff all costs herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that defendant W. J. Gibson do have and recover of and from the plaintiff, Houston Pasture Company, the following described property, to-wit: The West Two Hundred and Eighty and 12/100 (280.12) acres of Section 56 of the George H. Paul Subdivision of the Coleman-Fulton Pasture Company lands, South of Taft, according to a plat of said Subdivision duly recorded in the Plat Records of San Patricio County, Texas; and the title to said property is hereby vested in the said W. J. Gibson, for which he may have his writ of possession and against plaintiff all costs in this behalf expended, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that as to the defendant, A. A. Harrell, the plaintiff take nothing, and that defendant A. A. Harrell be permitted to go hence without day, and recover against plaintiff all costs herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that defendant A. A. Harrell do have and recover of and from the plaintiff, Houston Pasture Company, the title to the following described property, to-wit: 7.85 acres out of the N. E. $\frac{1}{4}$ of Section No. 2 of the George H. Paul Subdivision of the Coleman-Fulton Pasture Company lands West of Taft, and described as follows: Beginning at a concrete rock set by Fred Percival, County Surveyor of Aransas County, Texas, for the N. W. corner of the original Sam Houston Survey, for the N. W. corner of this survey; thence South 00° deg. 42' E. at 2,624.8 feet intersect the center line of Section No. 2 of George H. Paul Subdivision for the S. W. corner of this Survey; thence East with said line 114.2 feet intersect the East line 80 of Section No. 2 for the S. E. corner of this Survey; thence with the East line of Section No. 2 North at 2,626.8 feet intersect the North line of the Sam Houston Survey, from whence

an iron pipe at the N. E. corner of Section 2, bears North 18.2 feet for the N. E. corner of this Survey; thence with the North line of the Sam Houston Survey South 89° 08' W. 146.2 feet to the place of beginning; and the title to said property is hereby vested in said A. A. Harrell, for which he may have his writ of possession, and against plaintiff all costs in this behalf expended, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that as to the defendant John A. Harrell, the plaintiff take nothing, and that the defendant John A. Harrell be permitted to go hence without day, and recover of plaintiff all costs herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the defendant John A. Harrell do have and recover of and from the plaintiff, Houston Pasture Company, the following described property, to-wit: The Northeast $\frac{1}{4}$ of the Northwest $\frac{1}{4}$ of Section No. 41, and the Northwest $\frac{1}{4}$ of the Northwest $\frac{1}{4}$ of Section No. 41, of the George H. Paul Subdivision of the Coleman-Fulton Pasture Company lands South of Taft, according to a plat duly recorded in the Plat Records of San Patricio County, Texas, and the title to said property is hereby vested in the said John A. Harrell for which he may have his writ of possession, and against plaintiff all costs in this behalf expended, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that as to defendant D. W. Martin the plaintiff take nothing, and that the defendant D. W. Martin be permitted to go hence without day and recover of plaintiff all costs herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court 90 that the defendant D. W. Martin do have and recover of and from the plaintiff, Houston Pasture Company, the following described property, to-wit: The South $\frac{1}{2}$ of the Northwest $\frac{1}{4}$ of Section No. 41 of the George H. Paul Subdivision of the Coleman-Fulton Pasture Company lands South of Taft, according to a plat duly recorded in the Plat Records of San Patricio County, Texas; and the title to said property is hereby vested in the said D. W. Martin, for which he may have his writ of possession, and against plaintiff all costs in this behalf expended, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that as to the defendant W. E. Schmalsteig the plaintiff take nothing, and that the defendant W. E. Schmalsteig be permitted to go hence without day and recover of plaintiff all costs in this behalf incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the defendant W. T. Schmalsteig do have and recover of and from the plaintiff, Houston Pasture Company, the following described property, to-wit: The West $\frac{1}{2}$ of the Southwest $\frac{1}{4}$ of Section No. 41 of the George H. Paul Subdivision of the Coleman-Fulton Pasture Company lands South of Taft, according to a plat duly recorded in the Plat Records of San Patricio County, Texas; and the title to

said property is hereby vested in the said W. E. Schmalsteig, for which he may have his writ of possession, and against plaintiff all costs in this behalf expended, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that as to the defendant Alfred Sivvers the plaintiff take nothing and that the defendant Alfred Sivvers be permitted to go hence without day and recover of plaintiff all costs herein incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the Court
91 that the defendant Alfred Sivvers do have and recover of and from the plaintiff, Houston Pasture Company, the following described property, to-wit: The East $\frac{1}{2}$ of the Southwest $\frac{1}{4}$ of Section No. 41, of the George H. Paul Subdivision of the Coleman-Fulton Pasture Company lands South of Taft, according to a plat duly recorded in the Plat Records of San Patricio County, Texas; and the title to said property is hereby vested in said Alfred Sivvers, for which he may have his writ of possession, and against plaintiff all costs in this behalf expended, for which let execution issue.

The defendant, J. A. Harrell, having filed a disclaimer herein, it is hereby ordered, adjudged and decreed by the Court that the plaintiff take nothing as against him, and that he be permitted to go hence without day, and recover of plaintiff all costs in this behalf incurred.

It is further ordered, adjudged and decreed by the Court that the plaintiff by agreement take nothing by and through its suit against defendants, Wm. Traux, J. P. McDowell, H. McDowell, Martha McDowell, C. L. Vickers and W. M. Speesard and that these defendants be permitted to go hence without day, and recover of plaintiff all costs herein incurred, for which let execution issue.

Upon agreement of counsel it is determined by the Court that the value of the land recovered by the plaintiff from the defendants, Widgren and Anderson, at the time hereof, without the value of the improvements made thereon by the said defendants, is \$5,600.00.

Upon agreement of counsel it is determined by the Court that the value of the land recovered by the plaintiff from the defendant, T. N. Pullin, at the time hereof without the value of the improvements made thereon by the said defendant, is \$10,700.00.

It is further ordered, adjudged and decreed by the Court that defendant, John A. Harrell, take nothing by and through his
92 cross actions against the defendants, Coleman-Fulton Pasture Company, J. D. Cook, and A. A. Harrell, and that said defendants, and each of them, as to such cross actions, be permitted to go hence without day, and recover of said John A. Harrell all costs in this behalf expended. For which let execution issue.

It is further ordered, adjudged and decreed by the Court that the defendant, J. D. Cook take nothing by and through his cross action against the defendant, Coleman-Fulton Pasture Company, and that the defendant, Coleman-Fulton Pasture Company, be permitted to go hence without day and recover of said defendant J. D.

Cook all costs in this behalf expended. For which let execution issue.

It is further ordered, adjudged and decreed by the Court that the defendant W. J. Gibson take nothing by and through his cross action against the defendants, Coleman-Fulton Pasture Company and Detlef Hebbel, and that as to said cross actions the said defendants Coleman-Fulton Pasture Company and Detlef Hebbel be permitted to go hence without day and recover of said defendant, W. J. Gibson, their respective costs in this behalf expended. For which let execution issue.

It is further ordered, adjudged and decreed by the Court that the defendant Detlef Hebbel take nothing by and through his cross action against the defendant, Coleman-Fulton Pasture Company, and that as to such cross action the defendant Coleman-Fulton Pasture Company, be permitted to go hence without day and recover of the defendant Detlef Hebbel, his costs in this behalf expended, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the defendant, W. E. Schmalsteig, take nothing by and through his cross action against the defendant Coleman-Fulton Pasture Company and that the said defendant Coleman-Fulton Pasture Company, as to such cross action, be permitted to go hence without day, and recover of defendant W. E. Schmalsteig its costs in this behalf expended, for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the defendant Alfred Sivers take nothing by and through his cross action against the defendant Coleman-Fulton Pasture Company, and that as to such cross action the defendant Coleman-Fulton Pasture Company be permitted to go hence without day and recover of the defendant Alfred Sivers its costs in this behalf expended for which let execution issue.

As to any cross actions in this suit not otherwise disposed of in this decree, it is ordered, adjudged and decreed that the defendants bringing the same take nothing against the defendants against whom recovery is sought in the same, and that such latter defendants respectively go hence with their costs against such former defendants respectively; for which let execution issue.

It is further ordered, adjudged and decreed by the Court that the defendant, T. N. Pullin, do have and recover of and from his warrantors, to-wit: Coleman-Fulton Pasture Company, E. Cubage, J. C. Dougherty, J. W. Cook, S. J. Tipton and W. F. Traxler, the sum of \$11,984.02, with interest thereon from this date until paid at the rate of six per cent per annum, and all costs in this behalf incurred, provided, however, that the liability of each of said defendants shall not exceed the amount hereinafter set out and agreed upon between said Pullin and his warrantors, as follows, to-wit: Coleman-Fulton Pasture Company \$5,115.26; E. Cubage, \$7,068.37; S. J. Tipton, \$4,500.41; J. D. Cook and W. F. Traxler, \$11,984.02; J. C. Dougherty, \$8,370.43.

It is further ordered, adjudged and decreed by the Court that the defendants J. W. Crook and W. F. Traxler do have and recover of

and from the defendants Coleman-Fulton Pasture Company,
94 E. Cubage, J. C. Dougherty and S. J. Tipton, the sum of
\$8,370.43, with interest thereon from this date until paid at
the rate of six per cent per annum, and all costs in this behalf in-
curred, provided, however, that the liability of each of said defend-
ants shall not exceed the amount hereinafter set out and agreed upon
between the warrantors as follows, to-wit: Coleman-Fulton Pasture
Company, \$5,115.26; E. Cubage, \$7,068.37; J. C. Dougherty, \$8,
370.43; S. J. Tipton, \$4,500.41.

It is further ordered, adjudged and decreed by the Court that the
defendant S. J. Tipton do have and recover of and from the defend-
ants Coleman-Fulton Pasture Company, E. Cubage, J. C. Dougherty,
J. W. Cook, and W. F. Traxler, the sum of \$4,500.41, with interest
thereon from date until paid at the rate of six per cent per annum
and all costs in this behalf incurred, provided, however, that the li-
ability of each of said defendants shall not exceed the amount herein-
after set out and agreed upon between the warrantors, to-wit: Cole-
man-Fulton Pasture Company, \$5,115.26; E. Cubage, \$7,068.37; J.
C. Daugherty, \$8,370.43; and J. W. Cook and W. F. Traxler, \$11,
984.02.

It is further ordered, adjudged and decreed by the Court that the
defendant, J. C. Dougherty, do have and recover of and from the def-
endants, E. Cubage and Coleman-Fulton Pasture Company the sum
of \$8,370.43, with interest thereon from date until paid at the rate of
six per cent per annum and all costs in this behalf incurred, pro-
vided, however, that the liability of each of said defendants shall
not exceed the amount hereinafter set out and agreed upon between
the warrantors, to-wit: E. Cubage, \$7,068.37; Coleman-Fulton Pas-
ture Company, \$5,115.26.

It is further ordered, adjudged and decreed by the Court that the
defendant E. Cubage do have and recover of and from the defend-
ant Coleman-Fulton Pasture Company the sum of \$5,115.26, with in-
terest thereon from date until paid at the rate of six per cent
95 *per cent* per annum, as agreed upon between the warrantors,
and all costs in this behalf incurred.

It is further ordered, adjudged and decreed by the Court that the
defendants, Frank L. Widergren and John L. Anderson, shall have
of and recover from defendant Coleman-Fulton Pasture Company
the sum of (\$4,480.00) Four Thousand Four Hundred, Eighty
Dollars with interest thereon from date until paid at the rate of six
per cent per annum as agreed upon between the warrantors, and all
costs in this behalf incurred.

It is further ordered, adjudged and decreed by the Court that if
any part of the amounts hereinabove mentioned, which represent the
purchase price set out in the several deeds, is at this time represented
by outstanding and unpaid notes that said notes may be cancelled
and surrendered and in such case shall be accepted in part payment
of the liability against any of such defendants.

It is further ordered, adjudged and decreed by the Court that the
several amounts hereinabove stated represent the liability of the
several defendants upon their warranties, and, that execution shall

not issue in favor of any of the foregoing parties except the defendant T. N. Pullin and defendants Frank L. Widergren and John A. Anderson until such other defendants desiring execution shall first have paid the amount hereinabove adjudged against him. It is expressly ordered that no one of such warrantors shall be required to pay the amount hereinbefore adjudged against him, exceeding one time.

It is further ordered, adjudged and decreed by the Court that the execution may issue in favor of the officers of the Court against each of the parties hereto for all of the costs by them respectively incurred.

W. T. BURNS, Judge.

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O. K.

T., B., N. & O.,
Att'y- C. F. P. Co.

W. D. G.,

T. J. B.,

W. H. B &

H. M. H.,

Att'ys for Pl'tfs.

J. C. HOUTS,

Att'ys for Def'ts.

J. D. TODD,

Att'y for J. W. Cook, W. F.

Trazler, and S. J. Tipton.

O. K.

ROBT W. STAYTON.

Endorsed: D. L. No. 8. Houston Pasture Company vs. Alice State Bank, et al. Final Judgment. Filed May 28th, 1915. L. C. Masterson, Clerk, by J. A. Mount, Deputy.

Order Granting Defendants Ninety Days Within Which to Prepare and File Bill of Exceptions.

In the United States District Court for the Southern District of Texas, Sitting at Corpus Christi.

D. L., No. 8.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

The verdict of the jury in this cause was in open Court duly received, to which the defendants and each of them in open court duly excepted and thereupon the court caused the judgment to be entered on said verdict, to which said judgment the defendants therein and against whom judgments were rendered, did in open court duly except and upon motion in open court duly made, it is ordered that the defendants shall have ninety days from

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and after the adjournment of this term of Court within which to prepare and present for approval and file their bills of exception herein.

It is further ordered that the writ of error bond as between the plaintiff and the defendants in this cause be and the same is hereby fixed at the sum of \$4,000.00.

W. T. BURNS, Judge.

Endorsed: No. D. L. 8. In the United States District Court for the Southern District of Texas, Corpus Christi, Texas. Houston Pasture Company vs. Alice State Bank, et al. Order granting defendants ninety days within which to prepare and file bills of exception. Filed June 1, 1915. L. C. Masterson, Clerk.

Defendants' Bill of Exception.

Filed July 23, 1915.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

No. D. L., 8.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et als.

Be it remembered that upon the trial of the above styled and numbered cause the following testimony was adduced, to-wit:

Plaintiff offered in evidence the following instruments to-wit:

98 Certified copy of the Act of the Legislature of the State of Texas, passed July 22nd, 1870, entitled "An Act for the Relief of the Heirs of General Sam Houston, Deceased," which said Act reads as follows:

Chapter XIX.

An Act for the Relief of the Heirs of General Sam Houston, Deceased.

Section 1. Be it Enacted by the Legislature of the State of Texas, That the land certificate heretofore issued by the lawful authorities of the late Republic of Texas, to General Sam Houston for military services from November, 1835, to October, 1836, for twelve hundred and eighty acres be, and the same is hereby approved, and declared to be a just claim from its original date against the State of Texas; and that the Commissioner of the General Land Office be and is hereby authorized to issue a patent on the same, in the name of the heirs of General Sam Houston, deceased.

Sec. 2. That the owners of any land certificate, located on land in

conflict with a previous location made by virtue of the foregoing warrant, and not patented, are hereby authorized to locate the same on other lands; and that this act take effect and be in force from and after its passage.

Passed July 22, 1870.

Certified copy of the patent from the State of Texas, No. 566, Vol. 14, to the heirs of General Sam Houston, signed by Governor Richard Coke, Governor, which reads as follows, to-wit:

"Endorsed:." No. 566, Vol. 14, H'rs Sam Houston, Dec'd, 1,280 acres Bounty.

No. 566, Vol. 14.

In the Name of the State of Texas.

I, Richard ——— to all to whom these presents shall come:

Know ye, I, Richard Coke, Governor of the State aforesaid, by virtue of the power vested in me by law, and in accordance with the laws of said State in such case made and provided, Do by these presents Grant to the heirs of Sam Houston, Deceased, their heirs or assigns forever, Twelve Hundred and Eighty (1280) acres of land situated and described as follows:

In San Patricio County about 20 miles N. 83 deg. E. from the town of San Patricio, by virtue of Bounty Warrant No. 3894, issued by Geo. W. Hockley, Sec. of War, June 20th, 1838, Beginning at the N. W. cor. of a sur. for Chas. F. Delmas by virtue of Bounty Warrant No. 2869, for the S. W. cor. of this Sur. thence East with said Delmas Sur. 950 40/100 vrs. to its N. E. cor. thence south 88 40/100 vrs. to the N. W. cor. of League No. 1 of San Patricio County School Lands, thence East with its N. Boundary 2727 vrs. to a post for the S. E. cor. Thence North 1988 vrs. to a post for the N. E. cor. thence West 3677 90/100 vrs. to a post in prairie for N. W. cor. thence South 1900 80/100 vrs. to the place of beginning.

Hereby relinquishing to them the said Hrs. of Sam Houston, Decd., and their heirs or assigns forever all the right and title in and to said Land heretofore held and possessed by the said State, and I do hereby issue this Letter Patent for the same.

In Testimony Whereof, I have caused the seal of the State to be affixed as well as the seal of the General Land Office, Done at the City of Austin on the twenty-second day of June. In the year of our Lord, One thousand, eight hundred and seventy four.

[SEAL.]
[SEAL.]

RICHARD COKE, Governor.

J. J. GROSS,

Commissioner of the Gl. Ld. Office.

100 A. J. Houston, a witness for the plaintiff, testified as follows:

My name is A. J. Houston, I am the son of General Sam Houston. General Sam Houston had eight children and, starting with the

oldest, were named as follows: Sam Houston, Jr., Nannie Elizabeth Houston, whose husband is J. C. S. Morrow; Margaret Lee Houston, whose husband was W. L. Williams; Mary Willie Houston, whose husband was J. S. Morrow; Nettie Powers Houston, whose husband was W. S. Bringhurst; A. J. Houston; W. R. Houston, and Temple Lea Houston.

Sam Houston, Jr., was married to Lucy Anderson in November, 1875. She died in 1887. He died December 3rd, 1894. Two children survive this marriage, Margaret Bell Houston, born October 12th, 1876, married January 4th, 1900, to Mark L. Kaufman, Harry Howard Houston, born April 3rd, 1883.

The second child of General Sam Houston, to-wit, Nannie Elizabeth Houston, was born September 6th, 1846, married August 1st, 1866, to J. C. S. Morrow; both are now living. The third child of General Sam Houston, Margaret Lea Houston, was born October 13th, 1848, married October 17th, 1866, to W. L. Williams. He died March 11th, 1889, and she died March 12th, 1896. Five children survive this marriage, viz: Houston Williams, Franklin W. Williams, Mace Williams, — Williams, and James R. Williams. Madge Williams was born August 8th, 1874, and was married October 17th, 1895, to Roy W. Hearne. Mary Willie Houston, the fourth child of General Sam Houston, was born April 9th, 1850, and married J. S. Morrow, on April 11th, 1871. He died on May 20th, 1885. She is still living. Nettie Powers Houston, the fifth child of General Sam Houston was born January 20th, 1852, and married February 28th, 1877, to W. L. Bringhurst. He died February 18th,

1913. She is still living. Andrew Jackson Houston, the 101 sixth child of General Sam Houston and who is myself, was born January 21st, 1854. William Rogers Houston, the seventh child of General Sam Houston, was born May 25th, 1858. Temple Lea Houston, the eighth child of General Sam Houston, was born August 12th, 1860, and died August 15th, 1905. On February 14th, 1883, he was married to Laura Cross, who survives him with the following children: Temple Houston, Jr., born April 28th, 1884; Sam Houston, born Sept. 16th, 1891; Richard Houston, born October 5th, 1894; Mary Lee Houston, born August 28th, 1899.

The above are the descendants of General Sam Houston. He died July 23rd, 1863. My mother died December 3rd, 1867.

On cross-examination by defendants, the witness Andrew Jackson Houston testified as follows:

"My father and mother were married, I believe in May, 1840, in Marion, Alabama. My father's youngest child was born in 1860 and the first died in 1895, my eldest brother."

Plaintiff then offered in evidence the following instruments, to-wit: Original deed without warranty, of date May 9th, 1914, duly executed and acknowledged according to law from W. R. Houston and Andrew J. Houston, conveying to the Houston Pasture Company, a corporation organized under the laws of the State of Louisi-

ans with its domicile in Bossier Parish, Louisiana, an undivided one-fourth interest in and to the 1280 acres described in the patent to the heirs of General Sam Houston above set out.

Original deed without warranty of date May 16th, 1914, duly executed and acknowledged according to law from Nettie Houston Bringhurst conveying to the Houston Pasture Company, a corporation organized under the laws of the State of Louisiana with its
102 domicile in Bossier Parish, Louisiana, an undivided one-eighth interest in and to the 1280 acres described in the patent to the heirs of Sam Houston, above set out.

Original deed without warranty of date May 14th, 1914, duly executed and acknowledged according to law from Mary H. Morrow and Mrs. Nannie E. Morrow conveying to the Houston Pasture Company, a corporation organized under the laws of the State of Louisiana, with its domicile in Bossier Parish, Louisiana, an undivided one-fourth interest in and to the 1280 acres described in the patent to the heirs of Sam Houston, above set out.

Original deed without warranty of date May 14th, 1914, duly executed and acknowledged according to law from Madge W. Hearne, joined by her husband, Roy W. Hearne, Houston Williams, Marian Williams, Franklin Williams, and J. Royster Williams, sole heirs at law and successors in interest of Margaret Houston Williams, conveying to the Houston Pasture Company, a corporation organized under the laws of the State of Louisiana, with its domicile in Bossier Parish, Louisiana, an undivided one-eighth interest in and to the 1280 acres described in the patent to the heirs of Sam Houston, above set out.

Counsel then announced that plaintiff rests.

Defendants then offered in evidence the following instruments, to-wit:

Certified copy from the General Land Office of Bounty Warrant No. 3894, issued by George W. Hockley, Secretary of War, of the Republic of Texas, dated June 20th, 1838, to 1280 acres of land which reads as follows:

No. 3894.

1280 acres.

Republic of Texas.

Know all men to whom these presents shall come:

103 That Sam Houston having served faithfully and honorably for the term of eleven months, from the eleventh day of November, 1835, until the 20th day of October, 1836, and having been honorably discharged is entitled to twelve hundred and eighty acres Bounty Land, for which this is his certificate. And the said Sam Houston is entitled to hold said land, or to sell, alienate, convey and donate the same, and to exercise all rights of ownership over it.

In testimony whereof, I have hereunto set my hand, at Houston, this twentieth day of June, 1838.

GEO. W. HOCKLEY,
Secretary of War.

File 241.
San Patricio Bounty.
Warrant, 1280 acres.
Sam Houston, 3894.
Filed June 29th, 1853.
Re-filed Apr. 29/73.

Certified copy of field notes of 1280 acres survey made for Sam Houston by virtue of bounty warrant No. 3894 in San Patricio County, Texas, of date December 30th, 1872, which reads as follows:

THE STATE OF TEXAS,
County of San Patricio:

Field notes of a survey of Twelve Hundred and Eighty acres of land made for Sam Houston, it being the quantity of land to which he is entitled by Bounty Warrant No. 3894 issued to him by Geo. W. Hockley, Secretary of War, and dated at Houston, June 20th, 1838. Said survey is situated in San Patricio County, about 20 miles North, 83 deg. East of the town of San Patricio.

Beginning at the Northwest corner of a survey in the name of Cha. F. Delmas made by virtue of Bounty Warrant 2869 for the Southwest corner of this survey;

Thence East with the said Delmas survey 950-40/100 varas to its Northeast corner; Thence South 88-40/100 varas to the Northwest corner of League No. 1, of the School Lands of San Patricio County; Thence East with its North boundary 2727 varas to a post for Southeast corner; Thence North 1988 varas to a post for Northeast corner; Thence West 3677-90/100 varas to a post in prairie for Northwest corner; Thence South 1900-80/100 varas to the place of beginning. Surveyed August 25th, 1872.

BRIGIDO AGUIRRE,
BASILIO AGUIRRE,
CHAS. F. BLUCHER,
Chain Carriers.

I, Felix A. Blucher, Deputy Surveyor for San Patricio County, do hereby certify that the foregoing survey was made according to law and that the limits, boundaries and corners with the marks natural and artificial are truly described in the foregoing plat and field notes.

FELIX A. BLUCHER,
Deputy Surveyor of San Pat. Co.

I, John Ryan, County Surveyor of San Patricio County, do hereby certify that I have examined the foregoing plat and field notes and

find them correct and that they are recorded in my office in Book of Land Warrants pages 135 & 136.

Given under my hand this 30th day of December, A. D. 1872.

JOHN RYAN,
County Surveyor, San Patricio Co.

Certified copy of will of Sam Houston, as appears in Book D, pp. 613 & 614, Probate Records of Walker County, Texas, which reads as follows:

In the name of God, the Father, Son and Holy Spirit, I, Sam Houston, of the County of Walker and State of Texas, being
105 fully aware of the uncertainty of life and the certainty of death, do ordain and declare this my last Will and Testament.

First. I will that all of my just debts be paid out of my personal effects, as I think them sufficient without disposing of any of the family servants.

Second. I bequeath my entire remaining estate to my beloved wife, Margaret, and our children, and I desire that they may remain with her so long as she may remain in widowhood, and should she at any time marry, I desire that my daughters should be subject to her control so long as their minority lasts.

Third. It is my will that my sons should receive solid and useful education and that no portion of their time may be devoted to the study of abstract science. I greatly desire that they may possess a thorough knowledge of the English Language with a good knowledge of the Latin Language. I also request that they be instructed in the knowledge of the Holy Scriptures, and next to these that they may be rendered thorough in a knowledge of Geography and History. I wish my sons early taught an utter contempt for novels and light reading. In all that pertains to my sons I wish particular regard paid to their morals as well as the character and morals of those with whom they may be associated or instructed.

Fourth. I leave to my wife as Executrix and to the following gentlemen as my executors, Thomas Gibbs, Thomas Carothers, J. Carroll Smith and Anthony M. Branch, my much beloved friends, in whom I place my entire confidence, to make such disposition of my personal and real estate as may seem to them best for the necessities and interests and welfare of my family.

Fifth. To my dearly beloved wife, Margaret, I confide the rearing education and moral training of our sons and daughters.

106 Sixth. To my eldest son, Sam Houston, Jr., I bequeath my sword worn at the battle of San Jacinto, never to be drawn, only in defense of the Constitution, the Laws and Liberties of his Country. If any attempt should ever be made to assail one of these, I wish it to be used in its vindication.

Seventh. It is my will that my library should be left to the disposal of my dear wife.

Eighth. To my dearly beloved wife, I bequeath my watch and all my jewelry, subject to her disposition.

Ninth. I hereby appoint my dearly beloved wife, Margaret, Testamentary Guardian of my children, their persons and estate during minority. But should a wise Providence through its inscrutable decrees see fit to deprive our offspring of both parents and make them orphans indeed, it is hereby delegated to my Executors who are hereby confirmed, J. Carroll Smith, Thomas Carothers, Thomas Gibbs and Anthony M. Branch, to make such disposition in regard to their welfare, as they may think best calculated to carry out the designs as expressed in this my last will and testament.

Tenth. I direct and enjoin my Executrix and Executors, that after the Probate and registry of this my last will, and return of an Inventory of my estate, the County or other Court of Probate, have no further control over my Executors or Testamentary Guardian, or of my estate.

Done at Huntsville, the second day of April, 1863.

SAM HOUSTON.

Acknowledged in the presence of the undersigned and witnessed at his request.

JAMES R. COX.
W. H. RANDOLPH.
JACOB BANTON.
W. T. ROBINSON.

107 THE STATE OF TEXAS,
Walker County:

Personally came into open court Jacob Banton and made oath that he has examined the instrument of writing hereto attached, filed the 11th day of August, 1863, as the last will of Sam Houston and that the said Sam Houston declared the same to be his last will and testament and that he affiant signed the same as subscribing witness with W. T. Robinson and that he and the said Robinson signed the same as such at the request of the testator in his presence and in the presence of each other.

JACOB BANTON.

Sworn to in open court this 31st day of August, 1863.

JAS. L. SMITHER,
Chief Justice.

We, Thomas Carothers and J. Carroll Smith, do solemnly swear that the foregoing instrument which has been offered for Probate is the last will of Sam Houston, Deceased, so far as we know or believe and that we will well and truly perform all the duties of Executors of said will according to law and the best of our ability.

THOM CAROTHERS.
J. CARROLL SMITH.

Subscribed and sworn to before me, this the 31st day of August, A. D. 1863.

M. S. GIBBS,
Clerk C. C. W. C.

Filed August 11th, 1863. Recorded September 1st, 1863. M. S. Gibbs, Cl'k C. C. W. C.

Certified copy of order of the Probate Court of Walker County, Texas, as appears in Vol. D., p. 612, admitting to probate the will of Sam Houston, Deceased, which reads as follows:

108

475.

Last Will of Sam Houston, Deceased, by Thomas Carothers, Petitioner.

County Court, August Term, 1863.

This the 31st day of August in open court came on to be heard the petition of Thomas Carothers praying for the Probate and record of the Last Will and Testament of Gen. Sam Houston, Dec'd, late of this County, filed in this Court August 17th, 1863, with Jas. R. Cox, W. H. Randolph, Jacob Banton, and W. T. Robinson, subscribing witnesses thereto, and it appearing to the court that the notice required by law has been given and said will having been duly proven in open court by Jacob Banton one of the subscribing witnesses thereto, as will appear by reference to his affidavit attached to said will.

It is therefore, ordered, adjudged and decreed that said paper dated 2nd day of April, 1863, as aforesaid and so proven by said Joab Banton as aforesaid, be and the same is hereby established as the Last Will and Testament of the late Gen'l Sam Houston, Dec'd, and the same with the probate thereon by the said Jacob Banton be admitted to record.

And it appearing to the Court from an inspection of said Will that Margaret Houston, Thomas Gibbs, Thomas Carothers, J. Carroll Smith and Anthony M. Branch are named as Executors thereof, Anthony M. Branch being absent from the State at this time it is ordered that he be allowed sufficient time after his return, to qualify as such executor.

It is further ordered that Letters Testamentary issue to those of the above executors who may qualify upon their entering into bond with two or more approved securities in the sum of One Hundred and Fifty Thousand Dollars.

Certified copy of the oath of qualification of the executors of the estate of Sam Houston, Deceased, as appears in Vol. D., p. 614, Probate Records, Walker County, Texas, which reads as follows:

100

475.

We, Thomas Carothers and J. Carroll Smith do solemnly swear that the foregoing instrument, which has been offered for probate, is the last will of Sam Houston, Deceased, so far as we know or

believe, and that we will well and truly perform all the duties of Executors of said Will according to law and the best of our ability.

THOM CAROTHERS.
J. CARROLL SMITH.

Subscribed and sworn to before me this the 31st day of August, A. D. 1863.

M. S. GIBBS,
Cl'k C. C. W. C.

Filed August 17, 1863. Recorded September 1st, 1863. M. S. Gibbs, Cl'k C. C. W. C.

Certified copy of the bond of executors of the estate of Sam Houston, Deceased, as same appears of record in Vol. D, p. 614, Probate Records, Walker County, Texas, which reads as follows:

475.

THE STATE OF TEXAS,
County of Walker:

Know all men by these presents that we, Thom. Carothers & J. Carroll Smith, as principal, and J. T. Sims, W. R. Rhodes & H. M. Watkins, as sureties, are held and firmly bound unto the Chief Justice of the County of Walker in the sum of one hundred & fifty thousand dollars; for the payment of which well and truly to be made unto the same Chief Justice, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals, the seals being scrolls this the 31st day of August, A. D. 1863.

The condition of this obligation is such, that whereas
110 the above bound Thos. Carothers & J. Carroll Smith have been appointed by the Chief Justice Executors of the Estate of Sam Houston, Deceased, now if the said Thos. Carothers & J. Carroll Smith shall well and truly perform the duties required of them, under said appointment then this obligation shall be null and void; otherwise to remain in full force and effect.

THOM. CAROTHERS.	[SEAL.]
J. CARROLL SMITH.	[SEAL.]
J. T. SIMS.	[SEAL.]
W. R. RHODES.	[SEAL.]
H. M. WATKINS.	[SEAL.]

Approved this 1st day of September, 1863.

JAS. L. SMITHER,
Chief Justice.

Filed September 1st, 1863. Recorded September 1st, 1863.
M. S. Gibbs, Cl'k C. C. W. C.

Certified copy of the order of the Probate Court of Walker County, Texas, appointing appraisers of the estate of Sam Houston, Deceased, as same appears of Record in Vol. D., p. 619, Probate Records, Walker County, Texas, which reads as follows:

County Court, September Term, 1863.

No. 475.

Estate of SAM HOUSTON, Dec'd, by THOM. CAROTHERS & J. C. SMITH.
Extra.

Ordered by the Court that John McCreary, R. M. Hogue and H. M. Watkins be appointed appraisers of the property belonging to the estate of Sam Houston, Decd.

Certified copy of the inventory and appraisement of the estate of Sam Houston, Deceased, duly signed and sworn to as provided by law by Thomas Carrothers, and J. Carroll Smith, Executors, and H. M. Watkins and John McCreary, Appraisers, on December 2nd, 1863, and filed same day, duly recorded December 8th, 1863, in Volume D., page 369 of the Probate Records of Walker County, Texas, and in which particular attention was called to item under head "Polk County," 1280 acres of Bounty land doubtful at 50 cts. \$640.00.

Certified copy of the order of the Probate Court approving the inventory and appraisement filed, as appears of record in Volume D., page 636, of the Probate Minutes of Walker County, Texas.

A. T. RANDOLPH, a witness for the defendants, testified by deposition as follows:

My name is A. T. Randolph, I reside in Huntsville, Walker County, Texas. I hold the position of Clerk of the County Court of Walker County, Texas. The will of Thomas Carrothers was probated and established at the June term, 1867, by the County Court of Walker County, Texas, which June term opened on the 24th day of June, 1867, and adjourned on the 29th of June, 1867, as shown by the records of the Probate Court of Walker County, Texas, in my possession as County Clerk.

J. M. SMITHERS, a witness for the defendants, testified by deposition as follows:

"My name is J. M. Smithers. I am 71 years of age and reside in Huntsville, Walker County, Texas. Have done so since its organization in 1846. I knew General Sam Houston as a boy would know a man. I was personally acquainted with all the parties named as Executors in the will of General Sam Houston that was probated in Walker County, Texas. I know from hearsay that Thomas Carrothers died near Clerk Creek, Galveston County, Texas, in the year 1867. His estate was administered upon in Walker County."

112 Defendants offered in evidence the following instruments:

Certified copy of deed without warranty duly executed by J. Carroll Smith, as executor of the last will and testament of Sam Houston, Deceased, to Coleman, Mathis & Fulton, conveying Bounty land warrant No. 3894, which reads as follows:

THE STATE OF TEXAS,

Galveston County:

For and in consideration of the sum of Six Hundred Gold Dollars (\$600.00) in hand paid by J. Carroll Smith as executor of the last will and testament of Sam Houston, Deed., and by virtue of the authority given in said last Will and Testament, the same being duly probated and recorded in the Clerk's office of Walker County, said State of Texas, have and by these presents do, sell and convey unto Coleman, Mathis & Fulton their heirs & assigns, Bounty Land Warrant No. 3894 issued for twelve hundred & Eighty (1280 acres) of land to Sam Houston by Geo. Hockley, Secy. of War, on the 20th day of June, 1838. Hereby conveying all the right, title, interest and claim which the estate and heirs of said Sam Houston decd. has in and to said Bounty Warrant unto the said Coleman, Mathis & Fulton their heirs and assigns.

In witness whereof I hereto sign this 22nd day of July, 1871.

J. CARROLL SMITH,
Ex. Will Sam Houston. Dec'd.

Said deed was duly acknowledged as required by law and filed for record on June 27th, 1873, and duly recorded July 17th, 1873, in Book G., page 518, et seq., in the proper Deed Records of San Patricio County, Texas. To this deed is attached a copy of the will of General Sam Houston and the order admitting same to probate.

113 Certified copy of power of attorney duly executed by

Youngs Coleman appointing his son, Thomas M. Coleman, his true and lawful attorney with full authority to take charge of manage and control of all the property real and personal with full authority to sell any or all lands owned by said Youngs Coleman in the State of Texas. Said instrument being dated August 1st, 1871, duly acknowledged as required by law, and filed for record on the 7th day of August 1874, and duly recorded on the 12th day of August, 1874, in Book H, page 175 of the Deed Records of San Patricio County, Texas.

Certified copy of the order of the Probate Court of San Patricio County, Texas, made on July 25th, 1874, as shown in Vol. 1. page 513 et seq. of the Probate Records of San Patricio County, Texas, appointing Youngs Coleman community survivor of the estate of himself and his wife, Lucy Coleman, and further stating that Youngs Coleman duly qualified as such community survivor and duly executed the bond as required by law, which was duly approved as required by law.

Certified copy of deed containing general covenants of warranty

duly executed by Youngs Coleman as community survivor of the estate of himself and wife, Lucy Coleman dec'd; to Thomas M. Coleman conveying all of the community interests of the estate of Lucy Coleman in and to all property owned by Coleman, Mathis & Fulton. Said deed being duly executed and acknowledged as required by law and filed for record on the 25th day of July, 1874, and duly recorded on the 30th day of July, 1874 in Book H. page 169 of the Deed records of San Patricio County, Texas, the county in which said property was situated.

Certified copy of deed with general covenants of warranty duly executed by Amanda Newman, a daughter of Lucy Coleman, Dec'd, joined therein by her husband, Osias Newman, conveying
114 her interest in her mother's estate to Thomas M. Coleman.

Said deed being dated November 10th, 1875, duly executed and acknowledged as required by law and filed for record on the 3rd day of January, 1876, and duly recorded on the 18th day of January, 1876, in Book H. p. 337, of the Records of San Patricio County, Texas, in which county the property is situated.

Certified copy of deed with general covenants of warranty duly executed by Lucy Naunheim, a daughter of Lucy Coleman, Dec'd, joined therein by her husband, C. P. Naunheim, conveying her interest in her mother's estate to Thomas M. Coleman. Said deed being dated July 30th, 1874, filed for record August 7th, 1874, and duly recorded August 12th, 1874, in Book H. page 176, of the Deed Records of San Patricio County, Texas, the county in which the land is situated. Said deed being duly executed and acknowledged as required by law.

Certified copy of release duly executed by Lucy Neunheim joined therein by her husband, C. P. Neunheim to Thomas M. Coleman to whatever interest she may have in the estate of her mother, Lucy Coleman, dec'd, said release being dated July 7th, 1874, duly executed and acknowledged as required by law, and filed for record on the 7th day of August, 1874, and recorded on the 12th day of August, 1874, in Book H, page 176 of the Deed Records of San Patricio County, Texas, the county in which said property is situated.

Certified copy of deed containing general covenants of warranty, duly executed by Y. O. Coleman to Thomas Coleman, of date August 1874, said deed being duly executed and acknowledged as required by law, filed for record January 3rd, 1876 and duly recorded January 18th, 1876, in Book H. page 335, of the Deed Records of San Patricio County, Texas, the county in which said land is situated.

Certified copy of release duly executed by Y. O. Coleman to
115 Thomas Coleman to to whatever interest he may have in the estate of his mother Lucy Coleman, dec'd, said release being dated August —, 1874, duly executed and acknowledged as required by law, filed for record January 3rd, 1876, and duly recorded on January 18th, 1876, in Book H. page 334, of the records of San Patricio County, Texas, the county in which said land is situated.

Certified copy of deed with general covenants of warranty, duly executed by J. E. Coleman to Thomas M. Coleman, conveying what-

ever interest he may have in the estate of his mother, Lucy Coleman, Dec'd, said deed being dated August 1st, 1874, duly executed and acknowledged as required by law, and filed for record August 7th, 1874, and duly recorded August 12th, 1874, in Book H. page 178 of the Deed Records of San Patricio County, Texas, the county in which said land is situated.

Certified copy of release duly executed by J. E. Coleman to Thomas M. Coleman, to whatever interest she may have in the estate of his mother, Lucy Coleman, Dec'd, dated July 31st, 1874, and duly executed and acknowledged as required by law, filed for record August 7th, 1874, and recorded August 12th, 1874, in Book H. page 177 of the Deed Records of San Patricio County, Texas, the county in which said land is situated.

Certified copy of deed with general covenants of warranty duly executed by E. P. Coleman to Thomas M. Coleman, conveying his interest in his mother's, Lucy Coleman, Dec'd, estate, and said deed being dated October 24th, 1874, duly executed and *and* acknowledged as required by law, and filed for record January 3rd, 1876, and duly recorded January 18th, 1876, in Book H. page 336, of the Deed Records of San Patricio County, Texas, the county in which said land is situated.

Certified copy of release duly executed by E. P. Coleman to whatever interest he may have in the estate of his mother, Lucy
116 Coleman, dec'd, to Youngs Coleman, said release being duly executed and acknowledged as required by law, dated October 24th, 1874, and filed for record January 3rd, 1874 and duly recorded January 18th, 1874, in Book H. page 336, of the Deed Records of San Patricio County, Texas, the county in which said property was situated.

Certified copy of deed of partition made between T. M. Coleman, Youngs Coleman and George W. Fulton, as parties of the first part and J. M. Mathis and T. H. Mathis, as parties of the second part all composing the firm of Coleman, Mathis & Fulton. By this partition deed the title to the 1280 acres of land covered by Bounty Land Warrant No. 3894 and described in the patent from the State of Texas to the heirs of General Sam Houston, and which Bounty Land Warrant was conveyed to Coleman, Mathis & Fulton by J. Carroll Smith, executor of the estate of Sam Houston, deceased, was conveyed to T. M. Coleman and Youngs Coleman. Said parti-on deed being dated August 7th, 1879, and was duly executed and acknowledged as required by law, and was filed for record on the 26th day of August, 1879, and duly recorded on the 30th day of August, 1879 in Book H. page 748 et seq., Deed Records of San Patricio County, Texas, the county in which said property was situated.

Certified copy of deed with general covenants of warranty duly executed by T. M. Coleman, Youngs Coleman, George W. Fulton and James C. Fulton to Coleman-Fulton Pasture Company, a private corporation created under the laws of the State of Texas, conveying among other property the Sam Houston Survey of 1280 acres of land in San Patricio County, Texas, and which is the property involved

in this litigation. The entire property conveyed by this deed is described by field notes within which is included the 1280 acres covered by the Sam Houston Survey. Said deed being dated January 5th, 1881, and is duly executed and acknowledged as required by law, and was filed for record on June 10th, 1881 and recorded on June 11th, 1881, in Book H, page 891 of the Deed Records of San Patricio County, Texas, the county in which said property is situated.

Certified copy of patent No. 556 Vol. 14, issued by the State of Texas, to the heirs of General Sam Houston, covering 1,280 acres of land in San Patricio County, Texas, a copy of which is the same as that offered by plaintiff hereinbefore set out.

Certified copy from the General Land Office of a survey of land made in Polk County, Texas, by virtue of Bounty Warrant No. 3894, of date May 13th, 1853, which reads as follows:

STATE OF TEXAS,

Land District of Liberty:

Survey for Sam Houston of twelve hundred and eighty acres of land situated in the Northwest part of Polk County, on the waters of the Eastern San Jacinto about 21 miles E. of Livingston, being the quantity of land to which he is entitled by virtue of Land Warrant No. 3894 issued to him on the 28th Jan. 1839. Beginning on the most Southwestern boundary line of a survey of six hundred and forty acres made for William B. Williamson 880 varas from the most Western corner of the said Survey a stake from which a Black

S

Gum tree 18 in. dia. Mkd. H. brs. So. 87 deg. E. 7 2-10 vrs. and a white Oak 12 in dia. Mkd. \overline{X} brs. N. 36 deg. W. 2 vrs. Thence South 50 west at 45 vrs. a small creek runs So at 560 vrs. a branch crossed it several times runs E. at 1315 vs. a small branch runs E. of N. at 2295 vrs. intersected the Northeast boundary line of a League of Land titled to David Beers made corner a stake on said line

S

from which a Postoak 11 in dia. Mkd. H brs. N. 67 E. 11½ vrs. and a Postoak 8 in dia. Mkd. \overline{X} brs. N. 37 W. 3½ vrs.

Thence North 40 West with the Northeast boundary line of the said Beers League 2767 4-10 vrs. to a stake on said line (in a field). Thence North 50 E. 2688 vrs. to a stake from which a pine

S

12 in dia. Mkd. H brs. S. 8 W. 6 vrs. and a Postoak 10 in dia. Mkd. \overline{X} brs. N. 86 W. 12 3-10 vrs. Thence South 40 East 1684 4-10 varas made corner a stake from which a Redoak 14 in dia Mkd. \overline{X} brs. S. 85 W. 3 8-10 vrs. and a pine 12 in dia. Mkd. S and a Pine 12 in

S

H

dia. Mkd. H brs. So. 16 E. 8½ vrs. Thence South 20 East at 270 vrs. intersected the most Western corner of William B. Williamson

Survey at 480 vrs. a small creek runs So. at 1150 vrs. the beginning corner. Done May 13th, 1853.

JOHN McCREARY,
GILBERT C. RICHARDSON,
Chain Carriers.

JOHN R. JOHNSON,
Deputy Surveyor for the Land District of Liberty.

I, John R. Johnson, a Deputy for the Land District of Liberty do hereby solemnly swear under my oath of office that the survey designated by the foregoing plat and field notes was made by me on the 13th day of May, A. D. 1853, and that the lines, boundaries and corners of the same together with the marks natural and artificial are truly described therein.

Witness my hand this the 14th day of May, A. D. 1853.

JOHN R. JOHNSON,
Deputy Surveyor for the Land District of Liberty.

I, H. Jackson, Dist. Surveyor for the District of Liberty do hereby certify that I have examined the foregoing plat and field
110 notes and find them correct and that said field notes were recorded on the 28th day of May, 1853, in Record Book D. of Land Warrants pages 36 and 37.

H. JACKSON,
Dist. Surveyor.

File 135.
Liberty Bounty Field Notes 1280 acres
Sam Houston.

Filed June 29, 1853.
Correct on map in Polk County,
August 21/61.

H. R. VON BIBERSTEIN.

Sam Houston,
Field Notes 1280 acres
Issue a patent on this.
JNO. M. CREARY.

Certified copy from the General Land Office of a survey made November 8th, 1866, by virtue of duplicate Certificate No. 14/159, 1st Class, one-third of a league of land issued to Francisco Mancha, which appears from the certificate to have been located upon the survey as made by Gen'l Sam Houston, which reads as follows:

THE STATE OF TEXAS,
County of Polk:

A survey of 1880 acres of land made for Geo. F. Alford, on the 8th day of November, 1866—By virtue of duplicate Certificate No.

14/159 Class first, for 1-3 league of land, issued at Austin June 24th, 1862, for Chas. S. Taylor, assignee of Francisco Mancha, by S. Crosby, Commissioner Gen. Land Office, situated in the N. W. part of Polk County, about 21 miles West of Livingston, on the waters of the Eastern San Jacinto—Beginning on the most S. W. Boundary line of a survey of 640 acres made for Wm. B. Williamson
 120 850 vrs. from the most W. corner of said survey a stake from which a black gum tree 18 in. in dia. marked S. bears S. 87 E. 7 4-10 vrs. and a white oak lw. in. in dia. Marked X brs. N. 56 W. 2 vrs. Thence South 50 W. at 45 vrs. a small creek runs S. at 560 vrs. a branch crossed it several times runs E. at 1315 vr. a small branch runs E. of N. at 2295 intersected the N. E. boundary line of a league of land titled to David Beers made corner, a stake

S

on said line from which a post oak 11 in dia. marked H N. 67 E. 11½ vrs. and a post oak 8 in. in dia. marked X brs. N. 37 W. 3½ vrs. Thence N. 40 W. with the N. E. boundary line of said Beers league 2767 4-10 vrs. to a stake on said line (in a field). Thence N. 50 E. 2688 vrs. to a stake from which a pine 12 in. in

S

dia. marked H. brs. S. 8 W. 6 vrs. and a post oak 10 in. in dia. mkd. X brs. N. 86 W. 12 3-10 vrs. Thence S. 40 E. 1686 4-10 vrs made corner, a stake from which a redoak 14 in. in dia. marked

S

X brs. S. 85 W., 3 8-10 vrs. and a pine 12 in. in dia. Mkd. H brs. S. 16 E. 8½ vrs. Thence S. 20 E. at 270 vrs. intersected the most W. corner of Wm. B. Williamson Survey at 480 vrs. a small creek runs S. at 1150 vrs. the beginning corner.

IRA B. AGNEW,
Surveyor of Polk County, Texas.

JNO. MCCREARY &
 G. C. RICHARDSON,
Chain Carriers.

I, Ira B. Agnew Co. Surveyor of Polk County, do hereby certify that the survey designated by the foregoing plat and field notes made by John R. Johnson, former surveyor and adopted by me are true and correct and that the lines, boundaries, & corners of the same together with the marks natural and artificial are truly
 121 described therein and the same is duly recorded in Book A. on page 98.

Witness my hand this the 8th day of Nov. 1866.

IRA B. AGNEW,
County Surveyor of Polk County.

File 372 Liberty 1st Class.
 Field Notes 7,231,638.
 Francisco Mancha.
 Filed Nov. 21/66.

(In red ink.)

On a survey in the name of Sam Houston, file B-135. Otherwise correct on map in Polk County, December 6, 1866.

W. VON ROSENBERG.

Patented to Geo. G. Alford Ass'ee Nov. 7/70.

A. GANTOUR.

Field Notes of a Survey of 1,280 acres of land made for Geo. F. Alford CC Nov. 22, '66. Doyl.

Certified copy of plat of the Geo. H. Paul Company Subdivision of the Coleman-Fulton Pasture Company lands in San Patricio County, Texas, which shows the location of the different sections described in the deeds hereinafter referred to, and show that the lands which are described in the deeds hereinafter mentioned and in which said deed the lands are described as being parts of different sections of the George H. Paul Subdivision of the Coleman-Fulton Pasture Company lands, to be a part of and out of the 1,280 acres constituting the Sam Houston Survey, which is involved in this litigation.

Certified copy of warranty deed duly executed by the Coleman-Fulton Pasture Company, to W. L. Dusenbery, conveying the west one-half of fractional section 56 of the Geo. H. Paul Subdivision of the Coleman-Fulton Pasture Company lands containing 280.12 acres, according to the Geo. H. Paul Subdivision of the Coleman-Fulton

122 Pasture Company lands south of Taft, and which is a part of the 1,280 acres covered by the Sam Houston survey and involved in this suit, said deed being dated August 7th, 1908, duly executed and acknowledged as required by law, filed for record April 30th, 1909 and duly recorded May 31st, 1909, in Vol. Z, page 73 of the Deed Records of San Patricio County, Texas, the county in which said property is situated, all as required by law.

Certified copy of deed duly executed by W. L. Dusenbery to Detlef Hebbel, conveying the west half of Fractional Section 56 of the Geo. H. Paul Company's Subdivision of the Coleman Fulton Pasture Company lands containing 280.12 acres immediately next above described and which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated August 7th, 1908, duly executed and acknowledged as required by law and duly recorded April 26th, 1909 in Vol. Z. page 368 of the Deed Records of San Patricio County, Texas, the county in which said property is situated, all as required by law.

Certified copy of deed duly executed by Detlef Hebel to W. J. Gibson, conveying the west half of Fraction Section 56 of the Geo. H. Paul Company's subdivision of the Coleman-Fulton Pasture Company lands in San Patricio County, Texas, containing 280.12 acres of land immediately next above described and which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated October 2nd, 1911, duly executed and acknowledged as required by law, filed for record on the 7th day

of October, 1911 and duly recorded on the 10th day of October, 1911, in Book 40, page 614 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Certified copy of deed duly executed by the Coleman-Fulton Pasture Company to W. L. Dusenbery conveying the southeast quarter of Section 41 of the Geo. H. Paul Company Subdi-

123 vision of the Coleman-Fulton Pasture Company land in San Patricio County, containing 160 acres of land, and which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated August 7th, 1908, duly executed and acknowledged as required by law, filed for record the 16th day of June, 1909, and duly recorded on the 6th day of July, 1909, in Volume Z., page 100 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Original warranty deed duly executed by W. L. Dusenbery to Frank L. Widergren and John A. Anderson, conveying the the southeast quarter of section 41 of the Geo. H. Paul Company Subdivision of the Coleman-Fulton Pasture Company Lands in San Patricio County, Texas, containing 160 acres of land, and which is a part of the 1280 acres covered by the Sam Houston survey and involved in this suit, said deed being dated August 7th, 1908, duly executed and acknowledged as required by law, filed for record June 30th, 1909, and duly recorded August 4th, 1909, in Volume Z., page 398 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Certified copy of deed duly executed by the Coleman-Fulton Pasture Company to W. L. Dusenbery, conveying the east half of the Southwest quarter of Section 41, of the Geo. H. Paul Company Subdivision of the Coleman-Fulton Pasture Company lands in San Patricio County, Texas, containing 80 acres of land, and which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated August 7th, 1908, duly executed and acknowledged as required by law, filed for record June 16th, 1909, and duly recorded July 9th, 1909, in Volume Z., page 105 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

124 Original warranty deed duly executed by W. L. Dusenbery to Alfred Sivers, conveying the east half of the Southwest quarter of Section 41, of the Geo. H. Paul Company Subdivision of the Coleman-Fulton Pasture Company lands in San Patricio County, containing 80 acres of land, and which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated August 7th, 1908, duly executed and acknowledged as required by law, filed for record May 3rd, 1910 and duly recorded May 23rd, 1910 in Vol. Z page 583 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Original warranty deed duly executed by the Coleman-Fulton Pasture Company to W. L. Dusenbery, conveying the fractional

east half of section 56 of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company lands in San Patricio County, Texas, containing 160.08 acres of land, and which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated September 10th, 1908, duly executed and acknowledged as required by law, filed for record January 24th, 1910, and duly recorded January 27th, 1910 in Book Z., page 316 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law. Original warranty deed duly executed by W. L. Dusenbery to E. Cubage, conveying the fractional east half of Section 56 of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 166.08 acres, which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated September 10th, 1908, duly executed and acknowledged as required by law, filed for record February 24th, 1910, and duly recorded March 3rd, 1910, in Book Z. page 527 of the Deed Records of San Patricio County, Texas, the 125 county in which said land is situated; all as required by law.

Original warranty deed duly executed by H. Cubage to J. C. Dougherty conveying the fractional east half of Section 56 of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 166.08 acres, which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated February 10th, 1910, duly executed and acknowledged as required by law, filed for record 24th day of February, 1910, and duly recorded March 3rd, 1910, in Vol. 30 page 106 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Original warranty deed duly executed by J. C. Dougherty to J. W. Cook, conveying the fractional east half of Section 56 of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 166.08 acres, which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated July 24th, 1911, duly executed and acknowledged as required by law, filed for record on the 18th day of December, 1911, and duly recorded on the 29th day of December, 1911 in Volume 41, page 368 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Original warranty deed duly executed by J. W. Cook to W. P. Traxler conveying an undivided $\frac{2}{3}$ interest in and to fractional east half of Section 56 of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, and which is a part of the 1280 acres covered by the Sam Houston Survey, and involved in this suit, said deed being dated September 29th, 1911, duly signed and acknowledged, as required by law, filed for record December 18th, 1911, and duly recorded December 30th, 126 1911, in Volume 41 page 369 of the Deed Records of San Patricio County, Texas, the county in which said property is situated: all as required by law.

Original warranty deed duly executed by S. J. Tipton to J. W. Cook and W. F. Traxler, conveying an undivided one-third interest in and to fraction- east half of Section 56 of the Geo. H. Paul Company's subdivision of the Coleman-Fulton Pasture Company land and which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated October 9th, 1912, duly executed and acknowledged as required by law, filed for record October 3rd, 1913, and duly recorded October 13th, 1913, in Vol. 48, page 457, of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Original warranty deed duly executed by J. W. Cook and W. F. Traxler to T. N. Pullin, conveying the fractional east half of section 56 of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 166.08 acres, and which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated October 1st, 1913, duly executed and acknowledged as required by law, the said deed reciting a consideration* of \$4,000.00 cash paid and the assumption by the grantee of two certain promissory notes dated September 10th, 1908, each for the sum of \$639.41, executed by W. L. Dusenbery in favor of the Coleman-Fulton Pasture Company, and due on or before December 1st, 1913, and December 14th, 1913, respectively, and the balance evidenced by five promissory notes of even date with said deed each for the sum of \$1084.24 payable to the order of said grantors, one, two, three, four and five years after November 2nd, 1913, respectively, said deed being filed for record October 6th, 1913 and duly recorded November 19th, 1913, in Vol. 41, page 187
127 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Certified copy of deed duly executed by Coleman-Fulton Pasture Company to W. L. Dusenbery conveying the west half of the southwest quarter of Section 41 of the Geo. H. Paul Company's subdivision of the Coleman-Fulton Pasture Company land, containing 80 acres, and which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated July 25th, 1908, duly executed and acknowledged as required by law, said deed reciting a consideration of \$600.00 in cash and the further sum of \$1400.00, evidenced by five promissory notes of even date with said deed, each for the principal sum of \$280.00, and due December 1st, 1910, 1911, 1912, 1913 and 1914, respectively, said deed being filed for record January 7th, 1910 and duly recorded January 25th, 1910, in Vol. Z, page 313 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Certified copy of warranty deed duly executed by W. L. Dusenbery to C. W. Darnell, conveying the west half of the southwest quarter of Section 41 of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 80 acres, and which is a part of the 1280 acres covered by the Sam Houston

Survey, and involved in this suit, said deed being dated July 25th, 1908, duly executed and acknowledged as required by law, said deed reciting a consideration of \$963.33 cash and the further sum of \$436.67 evidenced by six notes of date July 25th, 1908, the first for the sum of \$306.12 and due December 1st, 1909, and five for the sum of \$26.11 each and due December 1st, 1910, 1911, 1912, 1913 and 1914, respectively, and in addition the assumption of five notes for the sum of \$280.00 each held by the Coleman-Fulton Pasture Company, said deed being filed for record Feby. 1st, 1910 and
 128 duly recorded Feby. 4th, 1910 in Vol. Z. page 506, of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all according to law.

Certified copy of warranty deed duly executed by C. W. Darnell and wife, Catherine L. Darnell to R. G. Sutton conveying the west half of the southwest quarter of Section 41 of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 80 acres, and which is a part of the 1280 acres covered by the Sam Houston Survey, and involved in this suit, said deed being dated October 15th, 1912, duly executed and acknowledged as required by law, reciting a consideration of One Dollar and other valuable considerations, said deed being filed for record December 16th, 1912, and duly recorded January 2nd, 1913, in Vol. 44, page 377 of the Deed Records of San Patricio County, Texas the county in which said property is situated; all as required by law.

Original warranty deed duly executed by R. G. Sutton and wife, Bertha Sutton to W. E. Schmalsteig, conveying the west half of the southwest quarter of section 41 of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 80 acres, and which is a part of the 1280 acres covered by the Sam Houston survey, and involved in this suit, said deed being dated December 7th, 1912, duly executed and acknowledged as required by law, said deed reciting a consideration of \$693.89 cash and the balance of \$2387.78 evidenced by three promissory notes of even date with said deed, two each for the sum of \$693.89 and one for the sum of \$1,000.00, due October 4th, 1913, 1914, and 1915, respectively. Grantee further assumes the payment of three notes for the sum of \$280.00 each held by the Coleman-Fulton Pasture Company, three notes for the sum of \$26.11 each held by W. L. Dusenbery, said deed being filed for record December 31st, 1912, and recorded January 17th, 1913, in Vol. 44, page 474 of the Deed Records of
 129 San Patricio County, Texas, the county in which said property is situated; all as required by law.

Certified copy of warranty deed duly executed by the Coleman-Fulton Pasture Company to W. L. Dusenbery, conveying the northeast quarter of the northwest quarter of section 41 of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 40 acres, and which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said — being dated July 27th, 1908, duly executed and acknowledged as required by law; said deed reciting a consideration of \$300.00 cash and a note for the sum of \$700.00 cash and the balance of

\$700.00 evidenced by five promissory notes of even date with said deed, each for the principal sum of \$175.00, due December 1st, 1910, 1911, 1912, and 1913, respectively, said deed being filed for record September 24th, 1909 and recorded September 30th, 1909 in Vol. Z page 184 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Certified copy of warranty deed duly executed by W. L. Dusenbery to George Brown conveying the northeast quarter of the northwest quarter of section 41 of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 40 acres and which is a part of the 1280 acres covered by the Sam Houston Survey, and involved in this suit, said deed being dated July 27th, 1908, duly executed and acknowledged as required by law, reciting a consideration of \$500.00 in cash and the balance evidenced by five promissory notes, one for the sum of \$180.00 and four for the principal sum of \$5.00, due December 1st, 1909, 1910, 1911, 1912 and 1913, respectively, and the further assumption of four notes for the sum of \$175.00 each held by the Coleman-Fulton Pasture Company, said deed being filed for record April 26th, 1910, and duly recorded May 21st, 1910, in Vol. Z. page 573 of the Deed
130 Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Original warranty deed duly executed by George Brown and wife to E. O. Sanders, conveying the northeast quarter of the northwest quarter of Section 41, of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 40 acres, and which is a part of the 1280 acres covered by the Sam Houston Survey, and involved in this suit, said deed being dated March 10th, 1913, duly executed and acknowledged as required by law, which deed recites a cash consideration of \$370.00 and three notes of even date with said deed, two for the sum of \$300.00 each and one for the sum of \$255.00, due December 1st, 1914, 1915, and 1916, respectively, and the further assumption of a note for the sum of \$175.00 held by the Coleman-Fulton Pasture Company, said deed being filed for record April 2nd, 1913, and duly recorded April 21st, 1913 in Vol. 47, page 228 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Certified copy of warranty deed duly executed by E. O. Sanders and wife to John A. Harrell, conveying the northeast quarter of the northwest quarter of section 41 of the Geo. H. Paul Company's subdivision of the Coleman-Fulton Pasture Company land, containing 40 acres, and which is a part of the 1280 acres covered by the Sam Houston Survey, and involved in this suit, said deed being dated September 5th, 1913, duly executed and acknowledged as required by law, said deed reciting a consideration of \$1628.70 paid and the further assumption of one note for the sum of \$175.00 held by the Coleman-Fulton Pasture Company, two notes for the sum of \$300.00 and one for the sum of \$255.00 held by E. O. Sanders and one for the sum of \$75.00 held by J. D. Cook, said deed being filed for record

September 6th, 1913, and duly recorded September 22nd, 1913, in Vol. 38, page 309 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Certified copy of warranty deed duly executed by the Coleman-Fulton Pasture Company to W. L. Dusenbery, conveying the northwest quarter of the northwest quarter of section 41 of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 40 acres, and which is a part of the 1280 acres covered by the Sam Houston Survey, and involved in this suit, said deed being dated December 1st, 1910, duly executed and acknowledged as required by law, said deed reciting a consideration of \$400.00 cash and four promissory notes for the sum of \$140.00 each, bearing even date with said deed and due December 1st, 1911, 1912, 1913 and 1914, respectively, said deed being filed for record August 28th, 1911, and recorded September 5th, 1911 in Vol. 31, page 131 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Certified copy of warranty deed duly executed by W. L. Dusenbery to Martin T. Yates, conveying the northwest quarter of the northwest quarter of section 41 of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 40 acres, and which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated August 1st, 1911, duly executed and acknowledged as required by law, said deed reciting a consideration of \$840.00 paid and the assumption of four vendor's lien notes for \$140.00 each held by the Coleman-Fulton Pasture Company, said deed being filed for record on the 19th day of September, 1911, and duly recorded on the 20th day of September, 1911, in Vol. 31, page 342 of the deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

132 Original warranty deed duly executed by Martin T. Yates, to J. D. Cook, conveying the northwest quarter of the northwest quarter of section 41 of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 40 acres, and which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated September 20th, 1911, duly executed and acknowledged as required by law, reciting a consideration of \$440.00 cash and the assumption by the grantee to pay four notes for \$140.00 each held by the Coleman-Fulton Pasture Company, said deed being filed for record September 25th, 1911 and duly recorded September 27th, 1911, in Vol. 40, page 554 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Original warranty deed executed by J. D. Cook and wife, to A. A. Harrell, conveying the northwest quarter of the northwest quarter of section 41 of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 40 acres, and which is a part of the 1280 acres covered by the Sam Houston Sur-

vey, and involved in this suit, said deed being dated January 6th, 1912, duly executed and acknowledged as required by law, reciting a consideration of \$500.00 cash and two notes for the sum of \$340.00 each bearing even date with said deed and due January 6th, 1913, and 1914, respectively, and the assumption of the payment for three notes for the sum of \$140.00 each held by the Coleman-Fulton Pasture Company, said deed being filed for record January 13th, 1912, and duly recorded January 22nd, 1913, in Vol. 41, page 503 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

133 Certified copy of warranty deed duly executed by A. A. Harrell and wife to John A. Harrell, conveying the northwest quarter of the northwest quarter of section 41, of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 40 acres, and which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated February 10th, 1911, duly executed and acknowledged as required by law, reciting a consideration of \$3060.00 cash and the assumption of one note for \$140.00 held by the Coleman-Fulton Pasture Company, said deed being filed for record February 11th, 1914, and duly recorded February 19th, 1914, in Vol. 49, page 428 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Certified copy of warranty deed duly executed by the Coleman-Fulton Pasture Company to W. L. Dusenbery, conveying the west half of the northeast quarter of section Two of the Geo. H. Paul Company's subdivision of the Coleman-Fulton Pasture Company land, containing 80 acres, and which is a part of the 1280 acres covered by the Sam Houston Survey, and involved in this suit, said deed being dated January 22nd, 1910, duly executed and acknowledged as required by law, reciting a consideration of \$432.00 in cash and the execution of five promissory notes of even date with said deed, each for the sum of \$201.60, due December 1st, 1910, 1911, 1912, 1913 and 1914, respectively, said deed being filed for record on the 6th day of May, 1910, and duly recorded on the 8th day of June, 1910, in Vol. 31, page 64 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

134 Certified copy of warranty deed duly executed by W. L. Dusenbery to Grant Van Sant, conveying the west half of the northeast quarter of section Two of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 80 acres, and which is a part of the 1280 acres covered by the Sam Houston Survey, and involved in this suit, said deed being dated September 9th, 1910, duly executed and acknowledged as required by law, reciting a consideration of \$4992.00 in cash and the further assumption of five vendor's lien notes for the sum of \$201.60 each, held by the Coleman-Fulton Pasture Company, said deed filed for record September 22nd, 1910, and recorded September 23rd, 1910, in Vol. Z, page 623, of the Deed Records of San Patricio

County, Texas, the county in which said property is situated; all as required by law.

Certified copy of warranty deed duly executed by Grant Van Sant to Eva J. Paul, conveying the west half of the northeast quarter of Section No. Two, of the Geo. H. Paul Compan-'s Subdivision of the Coleman-Fulton Pasture Company land, containing 80 acres, and which is a part of the 1280 acres covered by the Houston survey and involved in this suit, said deed being dated October 3rd, 1910, duly executed and acknowledged as required by law, reciting a consideration of \$4992.00 in cash and the assumption of five vendor's lien notes for the sum of \$201.67 each, held by the Coleman-Fulton Pasture Company, said deed being filed for record December 16th, 1910, and duly recorded on the 31st day of December 1910, in Vol. 37, page 474 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Certified copy of warranty deed duly executed by Coleman-Fulton Pasture Company to W. L. Dusenbery, conveying the east half of the northeast quarter of Section No. Two, of the Geo. H. Paul Subdivision of the Coleman-Fulton Pasture Company land, containing 80 acres, and which is a part of the 1280 acres covered by the Sam Houston Survey, and involved in this suit, said deed being dated January 22nd, 1910, duly executed and acknowledged as required by law, reciting a consideration of \$432.00 in cash and the execution of five promissory notes bearing even date with said deed, each for the sum of \$201.60, due December 1st, 1910, 1911, 1912, 1913 and 1914, respectively, said deed being filed for record 135 May 6th, 1910, and duly recorded June 8th, 1910, in Vol. 31, page 63 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Certified copy of warranty deed from W. L. Dusenbery to Grant Van Zant, conveying the east half of the northeast quarter of Section No. Two, containing 80 acres, of the Geo. H. Paul Company's subdivision of the Coleman-Fulton Pasture Company land, which is a part of the 1280 acres covered by the Sam Houston survey, and involved in this suit, said deed being dated September 9th, 1910, duly executed and acknowledged as required by law, reciting a consideration of \$4992.00 in cash and the further assumption of five notes for the sum of \$201.60 each, held by the Coleman-Fulton Pasture Company, said deed being filed for record September 22nd, 1910, and duly recorded September 22nd, 1910, in Vol. Z, page 621, of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Certified copy of general warranty deed duly executed by Grant Van Sant to Eva J. Paul, conveying the the east half of the northeast quarter of section No. Two, of the George H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company land, containing 80 acres, which is a part of the 1280 acres covered by the Sam Houston survey, and involved in this suit, said deed being dated October 3rd, 1910, duly executed and acknowledged as re-

quired by law, reciting a consideration of \$4992.00 in cash and the further assumption of five notes for the sum of \$201.00 each held by the Coleman-Fulton Pasture Company, said deed being filed for record December 16th, 1910, and duly recorded December 31st, 1910, in Vol. 37 Page 481 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Certified copy of general warranty deed duly executed by
136 Eva J. Paul and husband to John A. Harrell, conveying the northeast quarter of section No. Two of the Geo. H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company lands, containing 160 acres, which is a part of the 1280 acres covered by the Sam Houston Survey, and involved in this suit, said deed being dated May 29th, 1911, duly executed and acknowledged as required by law, reciting a consideration of \$2758.62 cash and the execution of seven notes, one for the sum of \$2856.99, due January 1 1912, three for the sum of \$593.67, two for \$996.87 and one for \$996.84 due December 1st, 1912, 1913, 1914, 1915, 1916, and 1917, respectively, said deed being filed for record June 7th, 1911, and duly recorded on the 17th day of June, 1911, in Vol. 40, page 2 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

Original warranty deed duly executed by John A. Harrell and wife to A. A. Harrell, conveying 100 acres off the East side of the northeast quarter of Section No. Two, which is a part of the 1280 acres covered by the Sam Houston survey and involved in this suit, said deed being duly executed and acknowledged as required by law, dated December 1st, 1911, reciting a consideration of \$2500.00 in cash and the execution of six promissory notes, one for the sum of \$500.00, four for the sum of \$750.00 and one for the sum of \$1,000.00, all of said notes bearing even date with said deed, and due on or before December 1st, 1912, 1913, 1914, 1915 1916 and 1917, respectively, said deed being duly filed for record April 1st, 1912, and duly recorded April 4th, 1912, in Vol. 42, page 302 of the Deed Records of San Patricio County, the county in which said property is situated; all as required by law.

Certified copy of warranty deed duly executed by the Coleman-Fulton Pasture Company to W. L. Dusenbery, conveying the south half of the northwest quarter of Section 41 of the Geo.
137 H. Paul Company's Subdivision of the Coleman-Fulton Pasture Company lands, containing 80 acres, and which is a part of the 1280 acres covered by the Sam Houston Survey, and involved in this suit, said deed being dated July 29th, 1908, duly executed and acknowledged as required by law, reciting a consideration of \$600.00 in cash and the execution of five promissory notes for the sum of \$280.00 each bearing even date with said deed, due December 1st, 1910, 1911, 1912, 1913 and 1914, respectively, said deed being filed for record September 9th, 1909, and duly recorded September 17th, 1909, in Vol. Z, page 179 of the Deed Records

of Patricio County, Texas, the county in which said property is situated; all as required by law.

Certified copy of general warranty deed duly executed by W. L. Dusenbery to Dan W. Martin, conveying the south half of the Northwest quarter of Section No. 41, of the Geo. H. Paul Company's subdivision of the Coleman-Fulton Pasture Company land, containing 80 acres, which is a part of the 1280 acres covered by the Sam Houston Survey and involved in this suit, said deed being dated July 29th, 1908, duly executed and acknowledged as required by law, reciting a consideration of \$960.83 cash and six promissory notes, one being for the sum of \$306.52 and five for the sum of \$26.53 each, due December 1st, 1909, 1910, 1911, 1912, 1913 and 1914, respectively, and the further assumption of five notes for the sum of \$280.00 each, held by the Coleman-Fulton Pasture Company, said deed being filed for record October 23rd, 1909, and duly recorded November 4th, 1909, in Vol Z, page 444 of the Deed Records of San Patricio County, Texas, the county in which said property is situated; all as required by law.

As between the defendants Coleman-Fulton Pasture Company and E. Cubage it was agreed that the consideration recited in the deed from the Coleman-Fulton Pasture Company to W. L. Dusenbery conveying the land that was afterwards described in the deed from W. L. Dusenbery to E. Cubage has been paid to the Coleman-Fulton Pasture Company.

E. CUBAGE testified in his own behalf as follows:

That he paid \$40.00 an acre for the 166.8 acres which he purchased from W. L. Dusenbery.

Mr. FRED PERCIVAL, a witness for defendants, testified as follows:

My name of Fred Percival. I am a civil engineer and surveyor. I hold the position of County Surveyor of Aransas County, Texas, have been surveyor for over twenty years in this state. My father's occupation was the same, under whom I worked as a boy. I am acquainted with the lands held by the Coleman-Fulton Pasture Company. That knowledge was acquired in the early days by carrying the chain for my father in making surveys and recently by my own surveys. I am more or less acquainted not only with the lands, but with the surveys composing the Coleman-Fulton Pasture Company lands. I am acquainted with the Sam Houston survey. I made a survey of the lands of the Coleman-Fulton Pasture Company in which the Sam Houston survey was included. I have located the Sam Houston survey. A few months ago was the last time I made a survey with a view of locating the boundary lines of the Sam Houston survey.

Witness was then shown a map of the Sam Houston Survey which is marked "Exhibit A" and is found in the addenda and with reference to same stated that the same was a map of the Houston survey containing 1280 acres.

"I prepared this map. The south corner of the Sam Houston

Survey is the northwest corner of the San Patricio School league No. 1. There is no question but that is a correct survey of
139 the Sam Houston survey. These notations made on the map are with reference to improvements thereon. The first notation shows the old Pistola Mill, another the tank, another the stock-pen, another a small house and the pasture fence and another called the old Pistola Mott. They are all shown and noted on the map. That map correctly represents the location of the Houston survey with reference to the improvements noted thereon. I located the improvements as shown on the map myself and they are correctly shown."

On Cross Examination the Witness Testified:

"The black spot marked house is there, but these are more recent improvements. That is about six or seven hundred feet from the south line of the Houston survey. I made notes of these improvements. They are correctly scaled on the map. I have not my notes with me but I can apply the scale and tell the distance. The house is about 600 feet from the south line. The mill is about half way or 300 feet. That is simply a wind-mill. The tank is recent. This measures between six and seven hundred feet. The house is between 600 and 700 feet north of the Houston survey. The small house marked right across the line has been recently built. There has never been any question about the location of the south boundary line of the Houston survey that I know of. I have never heard that the same was in any dispute. About two years ago I made a survey of this land those pens noted on the map straddled the south line and there are traces of them now, some old posts and an old gate. I did not meander the pen, I took off-set distances. The map shows relatively the amount of the pens on the Houston survey and the amount on the adjoining survey. This pen was about 200 feet long and about 75 to 100 feet in width and of a very
140 irregular shape, used for branding cattle in the spring of the year. It was an old place and had been added to from time to time. A number of different kinds of fences. I have been familiar with the Houston Survey as an individual survey for six or eight years. As a part of the whole survey for about 20 years. I have been familiar with these improvements since 1889 or 1891, particularly the Pistola fence, we used to camp there. These improvements were there then. The house that is now standing is comparatively new. I found a line running from the corner of the Delmar survey south 88. degrees. 4. vna. to the northeast corner of the San Patricio School League No. 1, at the correct distance."

On Redirect Examination, the witness Testified:

"The witness noted on the map the Southeast corner of the Houston Survey and stated that he recently located that corner and that he took Albert Warburton upon the ground and showed him that corner."

"I know Doris Rachal, Newt Rachal, John Waelder, Dave Odem, D. Willis, E. C. Hodges and R. D. Reed. All of these gentlemen I took upon the ground and showed them the south line of the Houston survey as located by me. About a year ago I think I showed Mr. J. C. Fulton the south line."

Defendants then offered in evidence the map of the Sam Houston Survey of 1280 acres in San Patricio County, Texas, which has been identified as being made by Fred Percival, the witness who had just testified and upon which map he delineated the improvements testified to. This map can be found in the addenda and marked Exhibit A.

DAVE ODEM, a witness for the defendants, testified as follows:

"My name is Dave Odem. I live in Sinton, San Patricio County, Texas. Have lived in San Patricio County 26 years. First
141 went to the county in 1881. I was sheriff and tax collector of San Patricio County from 1882 to 1886 and from 1892 until last September. During the time that I have lived in San Patricio County I have had occasion to become familiar with the pasture and lands of the Coleman-Fulton Pasture Company. I know the location of the old Pistola Mills. I first became acquainted with the mill in 1882. Out there adjacent to the mill at that time were some stock pens and a house. I do not recall how long these improvements stayed there. In 1886 I moved from San Patricio County and went to Live Oak County, but returned in 1892 and the same old pens were there. The wind-mill has since fallen down and the pens have been torn down. I was out on the ground where the mills and pens were located last Friday. Mr. Percival pointed out to me on the ground what purported to be the south line of the Sam Houston survey in San Patricio County, Texas. When I was out there last Friday I found some of the old pickets and blocks of the old house still there. The old mill is lying there on the ground, but a new mill has been erected over the same well that the old mill stood over. There are still some of the old fence posts of the pens. These improvements were all north of the south line of the Sam Houston survey with the exception of a small portion of the pens and it appears that the south line of the Sam Houston survey ran through the pens. In 1882 that house was used by Mexicans working for the Coleman-Fulton Pasture Company. I do not remember there being a field there at that time.

On Cross Examination, the Witness Testified:

That the mill had a wooden tower, consisted simply of a wheel and pump down in the pipe. Would think that the whole improvements cost about \$125.00 to \$150.00.

"This wind-mill was there in 1882. At that time the
142 Coleman-Fulton Pasture Company had a number of wind-mills scattered over the big pasture for the purpose of pumping water in dry times to supply the stock and they were generally running all the time, hardly ever turned them off. In 1882 there was a cow pen there used for branding cattle and for other pur-

poses. The pen was a good large pen built out of lumber, about 75 feet wide by 200 feet long, and southeast from the wind-mill. I do not think it was 350 feet from the mill, maybe 300 feet. Of course I don't know exactly. In 1882 there was an old Mexican living in the house I think by the name of Graviel Cruz. I knew him. The house he lived in was a lumber house, I should judge about 24 feet by 14 feet and was a box house covered with shingles as near as I can now remember. Lots of times I saw Mexicans living there. I have been there and stopped and got a cup of coffee and rested my horses. I know this Mexican was there for the Coleman-Fulton Pasture Company and I know that he was working for that company. He was a fence rider and looked after the fence. The company's pasture was a very large one and contained I suppose 50,000 or 60,000 acres. The Bay was the boundary on one side and there was a fence on the north side down to the creek between Waelder's ranch and the company's ranch, and McCampbell's ranch was on the east. The improvements that I mentioned are all that I remember. I do not know how long the pen stayed there. I suppose they would renew it every year when they rounded up cattle. I cannot tell how many Mexicans occupied this little house from 1882 to 1886. I do not know what happened there during the years I was away."

It was admitted by counsel for plaintiff that Mr. Percival, surveyor, showed Mr. Odem what purported to be the south line of the Houston Survey. The witness then testified on re-direct examination that the improvements that he had just testified to were
 143 all on the north side of the south line of and on the Houston survey.

Mr. JAMES C. FULTON, a witness for the defendants, testified as follows:

"My name is J. C. Fulton. I live at Corpus Christi, Texas. At this time I hold no position with the Coleman-Fulton Pasture Company. I remember the old partnership of Coleman, Mathis & Fulton. I was the son of the Fulton of that Partnership. From 1872 on for about 8 years I was in the employ of the Coleman, Mathis & Fulton partnership. T. M. Coleman, T. M. Mathis, J. H. Mathis and G. W. Fulton composed the partnership of Coleman, Mathis & Fulton. I was in the employ of that partnership at the time it dissolved. Coleman & Fulton succeeded to the partnership and I then entered the employment of Coleman & Fulton. T. M. Coleman, Youngs Coleman and G. W. Fulton at one time composed the partnership of Coleman & Fulton and I afterwards acquired an interest in it. In other words, the partnership of Coleman & Fulton succeeded to the partnership of Coleman, Mathis & Fulton by the elimination of T. M. and J. H. Mathis and subsequently the taking in of myself. During the time that I was connected with the firm of Coleman, Mathis & Fulton my duties were that of bookkeeper and representing my father's interest and as such it was a part of my duty to render the property constituting the holdings of Coleman, Mathis

& Fulton for taxation. I also for the partnership paid the taxes on this property. Subsequently during my connection with the partnership of Coleman & Fulton my duties were about the same. The Coleman-Fulton Pasture Company was a corporation organized I think about 1880, and at the time of the organization of this company I had an interest in it. I was not employed on a salary, but from the formation of the company for several years I assisted my

144 father who had charge of the main office. I have memorandum showing the properties that were held by the partnership of Coleman, Mathis & Fulton and subsequently by the partnership composed of Coleman and Fulton and subsequently by the Coleman-Fulton Pasture Company, showing what properties I rendered for taxes and what property I paid the taxes on and by referring to it will say that the Sam Houston survey in San Patricio County, Texas is among the property. This list I copied from the abstract book and it was kept for the purpose of checking up the taxes. This list is of the entire property of the Coleman-Fulton Pasture Company and it dates back to 1882. During the time that I was in the employment of Coleman, Mathis & Fulton, the partnership, the taxes on the Sam Houston survey were paid regularly every year; there never was a default, not one time. During the time that I worked for Coleman, Mathis & Fulton, the partnership, I paid the taxes on the Sam Houston survey in San Patricio County, Texas, each year as they accrued. Never at any time during the time that I worked for Coleman, Mathis & Fulton did the taxes on the Sam Houston Survey become delinquent. During the time that I worked for the partnership of Coleman & Fulton I paid the taxes on the Sam Houston survey each year as they accrued and never at any time while I worked for the partnership of Coleman & Fulton did the taxes on the Sam Houston survey become delinquent; and during the time that I worked for the Coleman-Fulton Pasture Company, a corporation, I paid the taxes upon the Sam Houston survey each year as they accrued and never at any time during the time that I worked for this company did the taxes on the Sam Houston survey become delinquent. Never at any time during the period beginning in 1880 when I worked for the firm of Coleman, Mathis & Fulton up to the time that I severed my connection in 1902, with the Coleman-Fulton Pasture Company did the

145 taxes on the Sam Houston survey ever become delinquent. During the time that I worked for the Coleman-Fulton Pasture Company that company paid the taxes on the Sam Houston survey every year as they accrued. I am familiar with the general use that was made of the old partnership of Coleman, Mathis & Fulton of the pastures in which was included the Sam Houston survey and that was the raising of cattle and horses. That partnership engaged to a very large extent in this business, often having at one time as many as 40,000 head grazing over the entire property of the company. What we called the big pasture was fenced in 1872."

Witness was then shown a map of the of the pastures of the Coleman-Fulton Pasture Company and which is the same map as is hereto attached and marked "Exhibit B."

"In 1872 the fence built covered the entire property except what was called the Brasada pasture and that was built afterwards. The Brasada pasture was on the west end of the company's land. All the cattle that were running in this pasture were branded by Coleman, Mathis & Fulton and the subsequent owners of the property. The fences running around the entire boundaries of the pastures of Coleman, Mathis & Fulton were completed in May, 1872. The fence was built on three sides and on a part of the fourth side. On the balance was the Corpus Christi bay, the Nueces bay and Puerto bay. I am familiar with the character of those three bays. The Nueces bay varies in width from one to three miles, which was the average width up and down the part of the fourth side which I spoke of as being bounded by the bays. The fences that we built on the other side that reached to the bay extended out into deep water sufficient to keep the cattle or stock from crossing. The fences were built out into the bay. The Nueces bay averages about six feet in depth, the Corpus Christi bay is deeper. I am familiar with the Pistola Mill and improvements as shown on the map of the Sam Houston survey. That mill was finished in the early part 146 of January, 1886. I am familiar with the Pistola pens, they were built long before the mill. We had a horse pasture and a little field there. I do not know the extent of it, and a house for accommodation. The pasture was for saddle horses and the Pistola was one of our headquarters for receiving and distributing cattle. We were buying cattle all over that country and they were delivered at several places, the Pistola, the Lasalle and Rincon Ranch and they were distributed from these points. The horse pasture and field that I spoke of were in addition to the fence. I remember distinctly of seeing the field in cultivation, because when we put up that mill we had some roasting ears and other vegetables from the Mexican who had charge there. We always had a man there in that little house (identifying a little house shown to be on the Sam Houston survey by the map) he was there for the purpose of keeping charge of the saddle horses and we had accommodations for the cow crowd that came in that neighborhood and for general ranch purposes. In building the fence in 1872 we built the best fence we knew how and used some barbed wire and some ribbon wire. I know of my own knowledge that the entire consideration stated in the partition deed between the members of the firm of Coleman, Mathis & Fulton has been paid."

Upon Cross Examination, the witness testified:

"In 1872 I became acquainted with the Sam Houston survey and the property of Coleman, Mathis & Fulton, I think it was in the early part of '72. At that time I was living at Fulton, which is about 147 thirty miles from the Houston Survey. I was head bookkeeper for the partnership. I couldn't say how many times during 1872 I went upon the Houston survey, neither would I say how many times I did in 1873. As many as three times. I don't know however, how many times I went, I went when ever I felt like it. That was true in 1874, '75 and '76. I did not go out there

enough to neglect my business. It was a big concern and I stayed close enough to keep up with my work. I did not do all of the work, most of it, however, for a few years. I lived at Fulton only a short time. I moved from there to Rockport which is thirty odd miles from the Houston survey. We had our office in Rockport for about nine years, from 1872 to '81. I never did go out to this property particularly to see the Houston tract. I did not have it specially in mind. I went out there when ever I felt like it, and some times I went there and spent a week on the ranch. The ranch headquarters were then at the Rincon ranch, which is about ten or twelve miles from the Houston survey and in going to the headquarters I would not go by the Hudson survey. There were six or seven years that I was not an employee of the company during which time I had a factory at Rockport, but I made excursions to the ranch occasionally. In 1886 I built the mill for the company. The mill I built was not there in 1872. There was a dug well there, however, before they had the mill up, that was for some years before. There are remnants still of the mill that I put up there. The mill is about 300 feet north of the south boundary line of the Houston survey according to the line shown me by the surveyor. Catarina Cruz was the name of the Mexican living there when I first remember these improvements. We had a number of Mexicans employed. I can't remember the first time I saw Mexicans there, but the last I recall was when we put up that mill in 1886, but I suppose they were there several years before that. We always had some body in charge of that house. I know that of my own knowledge. We had the entire ranch occupied and taken care of. I do not think it is a fact that this Mexican was in a little one-room shack about 325 feet south of the wind-mill which

I put up in '86. It was a small house and was not only occupied by the care-taker, but my recollection is that it was also for the cow-crowd that came along during all the time. We were constantly receiving cattle and distributing them into different pastures. The little field that I spoke of was north of the house and was located on or in the corner of the old field. I would not undertake to say how big this little field was, I think probably two or three acres. It was fenced with a board fence and I had some roasting ears at one time that were raised there. The lower part of this map (referring to the map of the entire pasture and which is marked "Exhibit B") is marked Nueces Bay, Corpus Christi Bay and Puerta Bay. The right hand corner is blue and is marked Puerta Bay and Copano Bay. The stream marked with a blue line on top of the land is what is called dry creek and only has water at tide water."

The witness was then requested by counsel to take his pencil and mark where the west wire fence was built on that ranch and to mark it X at the other end. This he did by the letters X-1 and X-2, as will appear on the map of the entire ranch.

"That enclosed what was known as the big pasture."

At the request of counsel he then marked with X-3 the terminus of the next fence running on the south line east from the southwest

corner of that angle and the terminus of the fence running from that point south to the bay he marked with X-4, as appears on the map of the entire property.

"That was the west line of the big pasture and my recollection is was built in 1872. The other fences around the pasture were started before this west fence was done and were finished as rapidly as possible, but the fence marked X was our west line fence. I have now got the entire enclosure, meaning the Cruz pasture as shown on the map fenced on the west, on the south, and on the east and a 149 creek on the north. Originally we had a fence along the whole Chiltipin creek as shown on the north by the map, but they built a dam in the mouth and it backed the water up 23 miles which I think came up about Mr. Grogan's place at the place marked 'A' on the map, and after that the company and Mr. John Waelder made a contract to give and take so as to run the fence. We ran that fence right along the creek. It was built in 1872. This fence ran all the way from Tom Coleman's ranch as appears on the map to the west fence. A portion of that big pasture was on the Nueces Bay and a part on the Corpus Christi Bay and the upper part on the Chiltipin Creek. The entire Chiltipin creek was fenced originally but after the building of the dam it made the water five or six — deep and the fence was abandoned up to this point marked "A." There was about 100,000 acres of land in the entire pasture."

At the request of the Court, the witness pointed out the Sam Houston survey which was that shown on the map.

"My brother did not attend to the paying of the taxes. All transactions and drawing checks were from the main office. I can say that the taxes were paid on everything that was in this enclosure. I do not remember the payment of any specific taxes on the Houston survey, except that I know it was on the list and I know that all the taxes were paid. The tax assessor always came to the office relative to the matter."

Mrs. E. A. BORN, a daughter of T. M. Coleman, a witness for the defendants, was then called to the stand and testified as to the heirship of Youngs Coleman, her grandfather, and thereupon counsel for plaintiff agreed with counsel for defendants in open court that there were six children as the result of the marriage between Youngs Coleman and Lucy Coleman and that said six children all lived to be grown and that said six children were the 150 same that executed the six several deeds to T. M. Coleman hereinbefore offered in evidence.

Mr. JOHN WAELDER, a witness for the defendants, testified as follows:

"My name is John Waelder. I live at Victoria, Texas; occupation cattle raising. I am acquainted with the properties of the old partnership of Coleman, Mathis & Fulton, and of Coleman & Fulton and now owned by the Coleman-Fulton Pasture Company. I became familiar with the fences of these companies because I

join fences with them on the north along what is known as the Chiltipin Creek. I am acquainted with the Pistola fence running through the Coleman-Fulton Pasture Company lands. That fence was built approximately in 1872 and '73, and is the fence beginning at the point marked XX as shown on the map and runs south through the Sam Houston survey to the Nueces Bay, as shown on the map of the company's property shown to me. That fence up and down the Chiltipin Creek was the joint fence built by the company and my father and it has been kept up jointly by my father and the company and after he died by myself and the company. The big pasture, by that I mean the Pistola land, was entirely fenced in 1872 or '73. The fence running from the points marked XX on the Chiltipin Creek south to the Nueces Bay is the Chiltipin fence and was the west line of the big pasture. This big pasture was used for running stock upon it, Coleman, Mathis & Fulton, then Coleman & Fulton and then the corporation of Coleman-Fulton Pasture Company. In those days I was familiar with the bays that lie to the south and on the east of the Coleman-Fulton Pasture Company property. I can't tell their approximate depth, but they were deep enough to prevent cattle crossing, unless they swam it. I am familiar with the improvements at the Pistola as shown on the map to be the Houston survey. Along in 1872, 1873 and 1874, 151 they had a little Mexican house or two out there and had pens where we used to camp. They had a stock pen and watering place there also. That house was occupied by a Mexican when I used to go there. This Mexican was there for Coleman, Mathis & Fulton at that time. I did not work much in that country after we divided up the cattle. We had our cattle in a joint pasture for a while and when we fenced our cattle ranged over on each other's lands until we got the division fence up along the Chiltipin Creek and then we moved our cattle over. Our division fence was along the Chiltipin. We put the fence so as to divide the water. They took first one side and we the other so as to give water to both pastures. This fence extended all the way down from Coleman's ranch, about six or eight miles. During the time that I was familiar with the big pasture lying south of the Chiltipin Creek owned by Coleman, Mathis & Fulton and subsequent owners it was used for the running of the owners' stock thereon."

On Cross Examination, the witness testified:

"After the building of that fence in '72 the creek did not form any part of the boundary of our division. Sometime afterwards, however, we put in a dam below Mr. Coleman's ranch, which ranch is shown on the map and along which we had at that time a fence, but after we put in the dam it made it navigable all the way up and we did not have any fence below the Coleman Ranch. After that we never had any fence from the Coleman Ranch down to the bay and as to that part of the company's lands the creek was the Northern boundary and these bays over here were the Southern boundary. They had a fence on the East side that was between McCampbell's pasture. The entire pasture was fenced on the east, and fenced on

the west and fenced on the north all the way down to T. M. Coleman's ranch and T. M. Coleman had a pasture down below him, and between T. M. Coleman's ranch and the Conopo bay we put in a dam and we had a short strip of fence where the water was shallow to keep the cattle from crossing. We owned the land on the north and the company owned the land on the south. After we put in the dam the fence between T. M. Coleman's ranch and the Copono bay as shown by the map was abandoned and fell down. Referring to the Pistola Mill I am sure there was a shack built there before 1872, because I stopped there myself. I remember that because my father died in May, 1877. That Mexican shack was right back of the pen. It was just a little east of the pen. I think it was a little further than 400 feet south of the wind mill, I don't know the exact distance, I suppose, however, approximately 400 feet southeast of the mill. I do not know the name of the Mexican I first saw there, nor how long he stayed. I reached the conclusion, however, that he was there for the company."

On Re-direct Examination, the witness testified:

"I was at the Pistola Mott, which is shown on the map of the Houston survey a few days ago. On May 22nd, Mr. Percival, the engineer at that time, showed me a line which he said was the south line of the Sam Houston survey. With that line in mind and my recollection of those improvements that I have testified to, I will state that the house was north of the south line of the Sam Houston survey and that the south line ran through the pens. The mill was on the north side. The fence which I spoke of as being abandoned and falling down after we built the dam was that east of the T. M. Coleman ranch. The water in the Chiltipin always was deep enough to prevent the crossing of stock."

153 On Re-cross Examination, the witness testified:

"In going from Rockport to Rincon we always would go by way of what is known as Puerto Bay. No, sir, we did not cross the bay, there was an extension of Puerto Bay you might call it, there were sloughs extending out on the land. Rockport is Northeast of Rincon headquarters. The cattle in that big pasture would run from one side to the other at will. There was nothing to keep the cattle from doing it until the company put in the division fence. They have had it subdivided quite a long time, I don't know how many years."

On Examination by the Court, the witness testified:

"The Pistola line of the fence was that running from a point on the Chiltipin Creek marked XX south through the Houston survey to the Nueces Bay at the point marked X-4. This fence ran north and south. It got the name Pistola from the Pistola motts out there, and I have known the ranch there as the Pistola Ranch."

NEWT RACHAL, a witness for the defendants, testified as follows:

"My name is Newt R. Rachal and I live at Falfurrias, Texas. I am in the stock and farming business. I am acquainted with the property formerly owned by the partnership of Coleman, Mathis & Fulton, then by Coleman & Fulton and now by the Coleman-Fulton Pasture Company. I first became acquainted with these properties in 1871. I was in the stock business at that time myself and worked cattle all over that country and worked a great deal for the company under Mr. Coleman. I began working in that company's pasture late in 1871. They completed the pasture fence as well as I remember in 1872 and then began to clear out stray cattle from the pasture. The fence I mean was that Coleman, Mathis & 154 Fulton ran a fence from the Nueces Bay over to the Chiltipin and down the Chiltipin to a point where the Chiltipin made no fence. The East side was fenced right away and I do not remember whether it was all fenced that year or not, but as near as I can remember will say that it was finished in 1872. I know that they collected the stray cattle and put them out of that pasture in 1873. This fence which was run from the Nueces Bay through to the Chiltipin was the west fence of the pasture and was known as the Pistola fence. I know that fence east of the bay,—all the fencing around the property was finished in 1873. The fence west of the Pistola fence I do not remember just when it was built, but I do know that it was completed before 1878. I know that I moved out of the country in '78 and I know that this fence was completed before that time."

Witness was then shown the map of the company's properties, which is the map that has been heretofore introduced and known as "Exhibit B," and he was then asked to point out the fence he referred to as the Pistola fence running from the Chiltipin to the Nueces Bay, and this he did by designating the fence beginning at the marks XX on the Chiltipin Creek and running to the mark X-4 on the Nueces Bay, and stating that this fence was completed in 1872; that it was the first fence and bounded the pasture on the west, but they afterwards built another line of fence.

"With reference to the fence up and down the Chiltipin the company and Mr. Waelder together ran a fence from where the Pistola fence strikes the Chiltipin, down to where the Chiltipin strikes the bay, running first on one side and then to the other. Mr. McCampbell's holdings were east of the company's holdings and a fence between the properties was put up and I know was completed by 1873. Now going back to the Pistola fence, west, I cannot say just when these fences enclosing those pastures were built, but 155 I know it was before 1878. The fence along the Chiltipin west of the Pistola fence was built before 1878. All of these properties west of the Pistola fence were entirely enclosed with a fence by 1878. The fence on the south side of the Cruz pasture as shown on the map, that was the division fence between my brother's pasture and the Coleman-Fulton Pasture Company. That was the division fence. I know that was entirely completed before 1878. I know the fence at the Doyle water hole which runs from a

point on the Chiltipin at the Coleman Ranch south to the Nueces Bay at the point called the Doyle water hole, as shown on the map of the company's property. I do not know just when this fence was built, but I know it was built by 1878. I went out to the place of the Pistola Mill a few days ago, Mr. Percival, the engineer, showed me what purported to be the south line of the Sam Houston survey. I remember those old improvements there at the Pistola Mill. I became acquainted with them along in 1874. They consisted of some pens, I think three pens connected up and two or three houses. I am sure there were two houses and possibly three. One house had about three rooms and a small well and later they had a little field fenced, but I do not remember just when it was. Those improvements were all situated north of the south line of the Houston survey. When I was there a few days ago I found remains of these improvements. I could see the blocks where the house stood and some of the old fence posts. No grass or weeds had ever grown on the spot where the pen was situated. I also saw the old well, the dug well that was used for drinking water. I recall the mill east of the mott, it was built several years after the house. This big pasture was used for grazing cattle by Coleman, Fulton & Mathis. I have never at any time heard of any one besides Coleman, Fulton & Mathis, Coleman & Fulton and the Coleman-Fulton Pasture
156 Company using that pasture. I never heard of any other person's cattle being permitted to graze or run in there after the pasture was fenced in 1872. I remember very well in 1872 or '73 when the big pasture was entirely fenced that the cattle were rounded up and the different owners came and got what belonged to them. Different parties used to round up down there and get the cattle out and after the enclosure was made the company rounded up the cattle that did not belong to them and turned them on the outside. I did a great deal of that work for the company myself under instructions from old man Tom Coleman. From that time on I have never heard of any cattle being permitted to range or pasture in that pasture there. So far as my knowledge goes Coleman, Mathis & Fulton, and Coleman & Fulton and the Coleman-Fulton Pasture Company are the only ones who have ever controlled that pasture."

On Cross Examination, the witness testified:

"Referring to the Cruz pasture as shown on the map, the west line was built in 1878. That line runs from the fence on the division line between the company's property and my brother's property on up to the Chiltipin. The Cruz lake formed no part of that fence. The first fence put in in 1872 was an all plank fence about $1\frac{1}{2}$ by 5 and I think three planks. My recollection is that barbed wire was introduced into this country in 1886. I do not think there was any barbed wire in this country in 1870. They used some of this old black wire or galvanized wire on this Cruz lake fence with a plank at the top. These fences had to be repaired frequently. I do not know about a great many stray cattle getting in and out of this pasture. I do know, however, there is always stray cattle in every place. They

get in through the gates or broken fences. After the Cruz Pasture was fenced on the west side the Pistola fence was never allowed to go down. In fact that Pistola fence was never allowed to go down as long as I lived in that country. I have not been familiar with it, however, since 1898, but up to 1898 I know that the fences were kept up and they later put barbed wire on all of them, I think four strands. Coleman, Mathis & Fulton built these fences and kept them up during all the time that I knew them. The division line between the Coleman-Fulton Pasture Company and my brother's property was built by my brother. They had nothing to do with the building of it, except they paid half of the cost. The fence over on the east side of the company's property and separating the McCampbell's land, which fence begins at the Corpus Christi Bay and runs up around to the Puerto Bay, as shown on the map was built by Coleman, Mathis & Fulton. I do not know how it was paid for."

Mr. R. C. RACHAL, a witness for defendants, testified as follows: "My name is D. C. Rachal. I am 74 years old and have lived in San Patricio County 48 years. I am acquainted with the old property of Coleman, Mathis & Fulton. I have been familiar with these pastures ever since they were put in by Coleman, Mathis & Fulton. I know the old Pistola fence that runs from the Nueces Bay to the Chiltipin Creek. It was built in 1872. I know what was known as the big pasture of Mathis, Coleman & Fulton. It was entirely fenced in 1873. The first fence, the Pistola fence was built in 1872. The lower fence, that is the one from the Puerto Bay to the Corpus Christi Bay which fenced off the peninsular was built in '73. They built the Pistola fence and the next year or so they built the lower fence. As soon as they got through they built this fence down here (pointing to the fence on the east of the company's property) to cut off Liveoak Peninsular. That fence was built down here starting at the point on the Corpus Christi Bay and running up to the Puerto Bay, as shown on the map, it was the fence between the company's pasture and the McCampbell land. That is the old fence, of course, they built a new fence afterwards, but that was the first fence. I do not remember when they built the fence west of the big pasture, the fence that encloses the Cruz pasture, I do know, however, that it was built sometime before 1878, maybe in 1876. The company used that big pasture for stock. No one else was permitted to run stock in there after the company fenced their land. Coleman, Mathis & Fulton exercise control over it. Tom Coleman was the man in charge and their control was exclusive. That control was exclusive and has continued from one to the other up to the present date. Coleman, Mathis & Fulton built all these fences that I spoke of. I am acquainted with the house that the Mexican lived in at the Pistola mill and the pens, wind-mill and cistern and roadway and gate coming through from San Patricio to Rockport. I was there when they were built, in fact was there before they were built. They were built about 1872 and a gate-keeper was put there to mind the gate. I was out there at the Pistola mill

a few days ago. Mr. Percival, the civil engineer, showed me what purported to be the south line of the Sam Houston survey. I saw the remains of the old improvements, which were old fence posts and blocks on which the house stood and where the old pen stood. These were all north of the south line of the Houston survey. I remember a Mexican living in this house at the Pistola Mill. The first one was named Catarina Cruz, another was named Benevidas. There were others there but I don't remember their names. Those Mexicans were looking out for the pasture and occasionally they had a bunch of horses there. They were working for Coleman, Mathis & Fulton. I remember a Mexican by the name of Juan Cruz; he was a son of Catarina Cruz. Coleman, Mathis & Fulton built these im-
 159 provements at the Pistola, the house and the pen and the well. I owned property adjoining the Cruz pasture on the south. I have lived there 48 years."

On Cross Examination, the witness testified:

"Sinton is a right brand new town, it is a good size town now—several thousand people. The town is on the Chiltipin Creek. It is correctly marked on the map of the company's property. There is also shown on the map a road called the Peter Mill and Sinton Road. That road has been there a good many years. It was built about the time the railroad was built. The Brownville Road also runs through the company's property as shown on the map. It was built seven or eight years back. In the lower part of the Cruz pasture is shown the Sharpsburg and Rockport Road. It is a very old road. People traveled through there years and years ago. It was a public road, but it was moved afterwards. The S. A. & A. P. Railway is also shown on the map. I think it was built about 1885. It runs through Sinton. Referring to the house at the Pistola Mill at which the Mexican Cruz lived, my recollection is that it was a lumber house and had a shed room to it, it may have had two rooms. It was a pretty good house for a Mexican and a shed back of that to cook 'Biley' in, I think that is the only house I ever saw there. I do not remember seeing any others there. The house stood about 325 feet southeast of the wind-mill. I do not know what survey the house stood on. The pen lies west and north of this house. The wind-mill was built there for the company by Mr. Fulton, built by Coleman, Fulton & Mathis. On the map is shown a town on the S. A. & A. P. railroad called Taft. A great many people live there. I do not think the town is now fenced off from the balance of the pasture. In both Taft and Sinton there are banks and mercantile establishments, and things of that sort. The town of
 160 Gregory is also shown on the map, also the town of Portland. These towns are in the big pasture. I do not know about being separately fenced off, they may have it fenced off outside of the lands, but there are no gates to go from one place to the other."

Mr. R. K. REED, a witness for the defendants, testified:

"My name is R. K. Reed. I live at Gregory in San Patricio County, Texas. I have lived there for 37 years. I am 58 years of

age. I began work for Coleman, Mathis & Fulton in 1878. I worked with the repair crowd and ~~and~~ with the cow crowd. The first work I did was to put up telephones from the Rincon Ranch to Rockport. When I went to work there I remember what was known as the big pasture, it was entirely fenced so that cattle could not get in nor out. The Coleman, Mathis & Fulton Company's cattle grazed on that pasture. No one else's cattle were permitted to go in there. I worked for the company off and on for about 14 years, until about 1900 or 1901. During all that time I was acquainted with the fences around the pasture. The fences were all kept up. We had fence riders all the time. I remember where the Pistola fence runs. I remember the fence west of the Pistola that runs to the Cruz lake. I do not remember when it was fenced, but I know the fence was there when I went to work for the company. It was a part of my duty to ride the fences. I rode them for Coleman, Mathis & Fulton, and for the Coleman-Fulton Pasture Company for quite a while. I repaired and kept up the fences, keeping them up was a part of my duty. I remember the old Pistola pens. They were there when I went to work for the company. They were still there and used in 1900 when I quit working for the company. They have new fences there now, but I do not know when they were taken away. We used to

pen cattle there. I remember the house that was there. I
161 could not tell how long it stayed there, but it was there when I quit working for the company. I remember Mexicans living there when I was working for the Coleman-Fulton Pasture Company. The first Mexican that I got acquainted with was M. Benavides and Condevario and a Mexican by the name of "Musca" and another Mexican by the name of Gonzalez. I recollect a little field being there and saw part of it in cultivation. I could not say how many acres. I suppose ten or twelve acres, maybe not so much and maybe a little more. I cannot recall very well the years that I saw it in cultivation. M. Benavides had a crop on it, I think it was in 1879. We repaired the house and pens during the time that I worked for the company. It was done by the Coleman-Fulton Pasture Company. I was out there a few days ago. Mr. Percival, the engineer, showed me what purported to be the south line of the San Houston survey. And according to that line these improvements were all north of the line. I remember the fence running from the Chiltipin at T. M. Coleman's place down to the Doyle Water Hole or Gum Hollow. The company had us put it there and I was one of the men who put it in. It was a short time after I went to work possibly about 1881 or 1882."

Upon being shown a map of the company's properties which is shown in the addenda as "Exhibit B" he identified the fence which he built as being that running between T. M. Coleman's ranch and the Chiltipin down to the Doyle Water Hole to a point on the Nueces Bay. This fence is about six or seven miles east of the Pistola fence.

"That was one of the fences that I rode and kept up. That fence was kept up. That fence was kept up during all the time that I worked for the company, which was up until 1900 or 1901."

I had charge of that pasture for 14 years and was on that fence all the time and I had this Pistola wind-mill to look after and had to go there pretty often from 1886 to 1900. I can't say how often I would be at the Pistola. Sometimes I would be there every day, sometimes it would be a week and sometimes it would be two or three days and sometimes I would not be there for two weeks."

On cross-examination, the witness testified:

"I know where the Pistola wind-mill was on that place. It is situated, to the best of my recollection, a little bit southwest of the house, about 300 or 350 yards. I know where the pen was, the house was southeast of the pen, kinder southeast. I am not positive that the line that the engineer showed me ran through the pen. I do not think the engineer showed me the posts of the old pen. He may have showed me that sketch of the Houston Survey. I remember a Mexican by the name of Benevides raising a crop there. I do not remember what he raised, I remember he had some corn planted. I meant to tell the jury there was a field of 8 or 10 acres there. It was fenced with wire of some kind. I think I have told all I know about it."

On examination by the Court the witness testified:

"I do not know what the little field and old horse lot was put there for. As I remember there was about 40 acres that we used afterwards for a horse pasture. We put our horses in there at night to keep them from straying off."

JUAN CRUZ, a witness for the defendants, testified:

"My name is Juan Cruz. I am 55 years old. I live in Gregory and know the Pistola Mill on the Coleman-Fulton Pasture Company property and I remember the little house that used to be out there. I lived in it in 1874 with my father and two sisters. We lived there from 1874 to 1878 for T. M. Coleman, attending to the pasture and watching the fence and watching the horses. One of my sisters was married in that house. There were pens there at that time for the cattle, also horse pens. At that time there was no field there, there was a well there. We left there in September and the same year a man by the name of Augustus Benevides came there with his brother-in-law. The company used those pens when they were gathering cattle and possibly branding. Used by the company for cattle and stock."

On cross-examination, the witness testified:

"The company used those pens all the year, every week or two. The house I lived in was a frame house. Two rooms, one about 10 by 20 and the other about 17 by 20. I don't remember when I last saw the house. The house was vacant three or four months before Benevides moved in."

JUAN FLORES, a witness for the defendants, testified as follows:

"My name is Juan Flores, and I am 55 years old and I live at Gregory. I worked for the Coleman-Fulton Pasture Company since 1884—commenced as a cow-boy. I know the Pistola Mill and know the pens, the house and mill out there. There were two pens and two houses—an old house and a new house and well and wind-mill out there in 1884. They were used for the cattle on that property. In 1884 Perfecto Musces lived in that house. He was not working for anybody. He was milking cattle of the company with permission of the man in charge. The pens were used to work with cattle. They used those pens every week or two. I know about the fences of the big pasture of the company. There was a fence then that went from the bay to the Chiltipin."

164 On cross-examination the witness testified:

"The old house had two rooms, the other house was very small, both were occupied. Perfecto Musces in one and San Bantes was out there. They were both very old men and did not do much work. Nobody lived there then except these two old men. I think they were there three or four years. The little house was east of the two room house, about fifty yards. There were two pens. One was about an acre square, a very large pen and the other was a small pen. There might have been another pen also. These pens were used for branding and also rounding up cattle. This old man planted some squash and water-melons around there. They had about one or two acres. There was a piece of ground with about 5 or 6 acres enclosed, but it was not a field. That was right close to the house, adjoining a pen on the south side."

On redirect examination, the witness testified:

"I continued to work for the company from 1884 to 1896 when I was out a year, and then I went back to work and then was out again about five years and then went back to work and having been working ever since. I went back the last time in 1897. The company used those pens all the time from 1884 up until the time Mr. Green came. He came in 1900."

On recross-examination, the witness testified:

"After these two old Mexicans left there nobody lived in those houses. When I first knew the place as Pistola the public road passed near the wind-mill right at the edge of the pen,—the road from Rockport to San Patricio. It was a much traveled road and passed near the edge of the pen."

165 JOE TUMLINSON, a witness for the defendants, testified as follows:

"My name is Joe Tumlinson. I am 38 years of age and I live in Taft and am in the employ of the Coleman-Fulton Pasture Company. I went to work for that Company in 1900. I became acquainted with the Pistola Mill and mott immediately after going to work for the company when there were some pens, a well and a

wind-mill there and an old shack of a house. Those pens were used at that time for herding pens for branding, in fact regular ranch work, and camping place. That was one of the camping places on the ranch. It was used for working of the cattle. I could not say how often we worked cattle up there, but it was a headquarters camp between those two pastures. Whenever those cattle were worked we used those pens. The Piccatche or Pistola pasture and the Cruz were shown on the map. They used these pens up until the time the land was sold to Geo. H. Paul, and the pens were torn down about three or four years ago. At first we had a wind-mill and cypress tank and afterwards there was a dirt reservoir put up in order to water the cattle. The reservoir is still there. A new mill is there now, the old one blew down. I was out on the ground a few days ago. Mr. Percival, the engineer, showed me what purported to be the south line of the Sam Houston survey. These improvements that I have been speaking of are all situated on the north side of this south line,—most of the pens were and the house and well entirely on the north side. I built a fence out there myself."

Witness was then shown a map, which is marked "Exhibit A," and shown in the addenda, which shows the Sam Houston Survey with black lines and parts of adjoining surveys, and was asked to show by this map which was the fence he built. Witness then stated that he built the fence at the southwest corner of the Todd survey and the southeast corner of the Sam Houston survey and ran in a southwesterly direction connecting with a fence on the little horse pasture and the old Pistola fence. This fence that I built was joined to the Pistola fence. I built that in the spring of 1905. At that time there was a fence running north and south between the Thos. Todd survey and the Sam Houston Survey, which is on the east end of the Sam Houston survey. North of the fence that I built was the railroad, which was fenced and also some small farms had been put in south of the railroad down to and on the Sam Houston survey which had already been fenced. The fence which I built began at the southeast corner of the Todd survey and came to this old Pistola fence, which was the division line between the Pictache and Cruz pastures, and this with the fence that had already been built gave me a little enclosure which I desired to use as a horse pasture, of about 2,000 acres. This enclosure was then bounded on the south by the fence which I built, on the west by the old Pistola fence, on the north by the fence of the S. A. & A. P. right-of-way, and the fences surrounding the small farms, and on the east by the Thos. Todd survey. The 2,000 acres enclosed is that shown in green on the map. That enclosure continued until about three years ago when the road along the south side of the Sam Houston survey was put in and the fence was then moved up to the road. The road is enclosed on both sides and is there now. The fence between the Thos. Todd and the Sam Houston surveys is there now. The fence on the north of this enclosure and along the small farms is there now. The fence around the rail-

road right-of-way is there now and the old Pistola fence is practically the same."

On cross-examination, the witness testified:

At the request of counsel, the witness marked on the map marked "Exhibit A" the beginning point of the fence built by him with the figure 1 and ran to figure 2 to the old Pistola fence. 167 Then using the old Pistola fence up to figure 3 on the railroad track, then down the railroad to the farms with the figure 4, then down around the farms to the line between the Sam Houston survey and the Todd survey to figure 6, then down to the place of beginning.

On Re-direct Examination, the witness stated that these 2,000 acres were used for a horse pasture and continued to be so used up until about three years ago, when they began to be cut into small farms, during all of which time it was used continuously for one purpose or another by the Coleman-Fulton Pasture Company.

On Re-Cross Examination the witness testified:

"That fence was constructed in the late winter or early spring of 1905. In 1908 some of this property was sold to Dusenbery or Paul, and as soon as they got it they commenced to cut it up and sell it out in farms to farmers, who cut it up and built their own fences. This fence running on the south of the Houston survey was torn down and as the farmers bought they readjusted the fences, so the fenced lands covering different periods of time after they purchased until the fence was built clear on up to the Pistola line, with a lane for the right-of-way. After Mr. Paul or Dusenbery bought, the fence which I had constructed was disregarded and now fences were built, but as soon as the farmers began to put in their fences our fences were re-adjusted. In 1908 that road on the south side of the Houston survey was graveled."

Mr. ALBERT WARBURTON, a witness for the defendants, testified as follows:

"My name is Albert Warburton. I am 43 years old and live at Victoria, Texas, occupation farmer. I worked for the Coleman-Fulton Pasture Company from 1901 to 1904. I remember 168 having put in farms for the Coleman-Fulton Pasture Company, the first one in January and February, 1904. I was up in the neighborhood of where these fences were put in a few days ago and Mr. Percival, the engineer, showed me what he said was the northeast corner of the Sam Houston survey, which is the same as is shown on the map showing the Sam Houston and adjoining surveys. With reference to this corner, the last one of the farms is right in here between figures 4 and 5. The fence between figures 4 and 5 is the fence on the northwest of the farms which I put — in 1904. The southwest line of these farms is the fence between figures 5 and 6. The fence I built began at figure 6, which is on the division line between the Thos. Todd and the

Houston survey, ran in an easterly direction to the Aransas Pass Railroad, then up the Aransas Pass Railroad to the point 4 and then down 4 to the point 5, then down 5 to 6. Two farms were put in of about 200 acres each, with a dividing line between the two farms, the dividing line No. 8 and 9. Then I divided each farm so as to give a part for a field and a part for a pasture. I finished these fences in the latter part of 1903 and in the spring of 1904 the land was plowed and put in cultivation. The fences were made of four strands of barbed wire. When I was down there a few days ago the fence was still there and in good condition."

On Cross Examination, the witness testified:

"I remember that date by some notes which I made at that time and which the company now has and which notes I saw a few days ago and refreshed my memory. The pasture fence between the Todd survey and the Houston survey had been built some two or three years before I built my fence in 1903. With the exception of the railroad right-of-way fence, the fences around these two farms were independent. The pasture fence that Mr. Tumlinson built was after the pasture fence that I built. It is not a
169 fact that the first crop raised on that land was in 1905. A man by the name of Moore and one by the name of Barrier and one by the name of J. P. Jackson, tenants of the company, raised the first crops on this property. The first land which was grubbed and put in cultivation were the fifty acres next to the railroad. The fall of 1904, we started to grub another 50 acres. I did not get through with grubbing the second farm until 1905, which was the southwest part of the farm. These farms run out 80 chains from the railroad and the part next to the railroad was first put in cultivation. I left there December 29th, 1904."

Mr. Jos. F. GREEN, a witness for the defendants, testified as follows:

"My name is Joseph F. Green. I live at Gregory, Texas. I am superintendent of the Coleman-Fulton Pasture Company. I have been such since 1900. I remember the farms that Mr. Warburton put in. That was in 1904. He put in two farms of 200 acres each. They lie between the Aransas Pass Railroad on the south and run over on the Houston survey, as shown on the map. The part next to the railroad was put in cultivation,—fifty acres first. In the beginning we fenced off 100 acres on the back end for the pasture and from these farms up next to the railroad track we put a lane back to the pasture so they could pasture their stock. These farms were being cultivated before April 5th, 1904, and from that day on down to the present time these outside fences have continued and the middle fences between the farm lands we divided into 100 acre tracts two or three years afterwards and moved the pasture fences back so that there is now only 50 acres running around the 200 acres have never been changed. The in each pasture and 150 acres in cultivation. The original fences Coleman-Fulton Pasture Company owns this land and has been

exercising control over it ever since I have been connected with the company and I have never heard of any one else attempting to exercise control over it. Crops have been raised on it every year since 1904 down to last year and they are farmed this year. When I went to work for the company in 1900 I had occasion to become familiar with the improvements at the old Pistola mill. One of the first things I did was to ride over the pastures and familiarize myself with the improvements thereon. At that time the pastures were all enclosed by fences, which were in very fair condition. The improvements at the Pistola mill consisted of pens, a cypress tank, and an old house. There was a small trap there. I could not say how many acres and there is a pasture of from 10 acres up, a small number of acres used for keeping horses when working cattle. This mill and the pens, etc., were used I will say as many as 15 or 20 times a year. I am familiar with the division fences over the pasture as they were found in 1900."

Witness was then shown a map of the entire pasture and was asked to state what fences were there in 1900, and in response to this question he stated:

"The saddler pasture was fenced on the west side as indicated on the west side of the company's ranch. Beginning at the southwest corner of the saddler pasture, a main fence followed out the distance of perhaps six or seven miles and then it went to what might be called the Northwest corner of the company's land, what is called the Turkey Mott Pasture and we joined with Mr. Waelder's pasture and ran down to what is called the Stokes ranch and several little fields on the outside fence that separated us from Mr. Waelder, until we reached the town of Sinton. The town of Sinton at that time was fenced in a tract of land about 200 acres, which on this road there was a gate at the upper end and as we ran into the town of Sinton, and we followed up this fence between Cruz and Saddler's and Turkey Mott Pasture, and that fence so described was
171 between the Cruz Pasture and the Picatche pasture; on the north side of the Cruz pasture Mr. Waelder's pasture extended down so that it was fenced on that side. The Picatche pasture at that time was separated by the railroad. Mr. Coleman's fence separated and followed east down the creek until it came to the old dam enclosing the place and joining this fence. In addition to this there is a fence from the Chiltipin at T. M. Coleman's place down to the Doyle Water Hole on the Nueces Bay. At the time I went there the Chiltipin Creek was all fenced except for a little ways south of the T. M. Coleman ranch and this dam backed the water up. This was on the north of what was called the Beef Pasture and that was the separation between the Beef Pasture and Mr. Waelder's. Then there was the Rincon pasture which was surrounded by different bays and the McCampbell's pasture surrounded it at this point. Then there was a fence between the big pasture and this called the Mud Flats pasture. These fences were all there when I went there. There was a fence that led from the Doyle Water Hole on the Nueces Bay up to the Coleman Pasture."

Q. How long had the circumscribing fence you spoke of, how long did that continue?

A. Well this land or tract that the Paul people bought some time in 1908, and as these people bought lands and enclosed their pastures we continued to enclose our pastures by joining on to their pastures and the town of Sinton, we came in there for about two years after and kept these gates closed going there to about 1910 or 1911.

Q. The outside fence, how long did that continue, up until what time?

A. Well that continued up—most of them are still as they were. I was studying to see if any of them have been changed. If there have any been changed they have been changed in the last
172 two or three years, but very few, or minor changes have been made. Whenever they have been changed they have been fenced up by farmers generally putting in fences.

Q. State whether or not there has ever at any time that you have been connected with the Company, been any lapse of time that the property was not fenced?

A. No, sir.

Q. This is the Aransas Pass Railroad over here through Sinton?

A. Yes, sir.

Q. With reference to the San Antonio & Aransas Pass Railroad, the Aransas Pass Railroad was there in 1900?

A. Yes, sir.

Q. Was that fenced when you came there?

A. Yes, sir.

Q. State whether or not that has been continuous, the fencing, down to the present time?

A. Yes, sir.

Q. You spoke about the outside fence, this fence, leading up from the Doyle water hole, how long did that fence continue there—from the water hole to Tom Coleman's place?

A. Up to 1910 or 1911, except where it was joined by farmers where it was torn down and we joined on to it.

Q. You spoke of the town of Sinton being surrounded by a fence. How long did that fence continue around the town of Sinton?

A. About 1910 as near as I can remember, some time in that year; that is on the side next to the Paul land.

Q. When you came there in 1910, state whether or not the town of Taft was there?

A. Yes, sir.

Q. Who laid out the town of Taft?

A. I think Mr. Percival did.

Q. Did the company have it laid out?

A. Yes, sir.

173 Q. State whether or not Mr. Percival, the Civil Engineer, showed you the corners of the Sam Houston survey and located it for you?

A. Yes, sir.

Q. State whether or not the Company has been using it during that time?

A. Exclusively up to the time I sold it, and they used part of it after that, then after they sold it they enclosed it.

Q. What use did you make of it generally.

A. With the exception of these farms, when the farms were put in in 1905, it has been used for pasturage of cattle.

Q. State what use the Company has made of that Sam Houston Survey during the time you have been there, with reference to excluding others from the use of it?

A. Well, we have used it all the time until we sold it, and they fenced it up and have not allowed anybody else to use it and nobody else has wanted to use it.

On Cross Examination, the witness testified:

"The entire water front of the Company's properties is about 14 miles and along which there is no fence except that the company's fence runs out into the water. It is navigable for small boats. With reference to the abandonment of the fence along the Chiltipin creek below T. M. Coleman's place all I know about it is that there are signs of an old fence along that part of Coleman's place to the dam, but there was no fence there when I came. The land in controversy is good farming land. Last year we got something like \$3.00 an acre for that we farmed and some years we have gotten as high as \$10.00. I think the rent we got from crops on the farms located on the Houston survey would average about \$8.00 an acre. The Juan Garcia survey is north of the Houston survey and the two farms mentioned lie partly in the Juan Garcia survey and the 174 Houston survey. I know that those farms were in cultivation prior to April 5th, 1904, because that was my birthday and I remember going along there and seeing those fellows harrowing in the field and it was really then my troubles began because it was the first farming I had done."

On Re-direct Examination, the witness testified:

"There were two more farms put in immediately northwest of these two that were put in in 1904. I think they were put in about 1906. The triangle lying between four and five has been farmed ever since it was put in down to and inclusive of this year and contain some 200 acres. They were fenced before the crop was put in in 1906. The depth of the water in the Chiltipin is estimated between 10 and 15 feet. The cattle never cross it. There was a government employee who took the soundings of Corpus Christi Bay and it ran from 9 to 12½ feet. The Corpus Christi Bay is about 12 miles wide and the Nueces Bay is from 3 to 5 miles wide. Copano Bay and Puerta Bay vary from a half mile to 10 miles in width. I have never had any cattle to cross any of these bays."

The defendants then offered in evidence the map of the Coleman-Fulton Pasture Company's holdings, showing the location of the Sam Houston Survey, and which has been identified by the defendants' witnesses and which map was made by Frank M. Percival.

County Surveyor of Aransas County, Texas, and is the map which is shown in the addenda and marked "Exhibit B."

The defendants offered in evidence the map of the Sam Houston Survey and adjoining surveys made by Percival and Son, which has been identified by the defendants' witnesses who testified with reference thereto, and which map is shown in the addenda and is marked "Exhibit A."

The defendants then offered in evidence the file marks on Plaintiff's Original Petition in this cause, as follows:

"Filed at 7 o'clock a. m., May 30th, 1914. L. C. Masterson Clerk, by J. A. Mount, Deputy."

FRIED M. PERCIVAL, a witness for the defendants, testified as follows:

"Fractional Sections 56 of the Geo. H. Paul Subdivision of the Coleman-Fulton Pasture Company lands lies in the Sam Houston survey and is the W. J. Gibson tract, a part of which Section 56 is now owned by W. J. Gibson and a part by T. N. Pullin. Section 41 of the Geo. H. Paul subdivision of the Coleman-Fulton Pasture Company lands lies upon the Sam Houston survey, a part of which is owned by Widergren and Anderson, and a part by the Alice State Bank, a part by A. A. Harrell, a part by John A. Harrell, a part by A. Sivers, a part by W. E. Schmalsteig and a part by D. W. Martin. Section No. Two of the Geo. H. Paul Subdivision of the Coleman-Fulton Pasture Company lands west of Taft lies exactly west of Section 41, above mentioned and a small part of Section No. Two lies in the Sam Houston Survey. In other words, the Sam Houston survey overlaps Section No. Two a little bit."

At this point counsel for plaintiff admitted that the Sam Houston survey overlapped a portion of Section No. Two.

"The Thos. Todd survey lies east of the Houston survey and the Blanchard survey west, so that Section No. Two of the Paul Subdivision lies in the Blanchard and the Houston Survey."

On behalf of the defendants, Frank Widergren and John A. Anderson evidence was then offered showing that John A. Anderson owned an undivided one-half interest and that Frank Widergren owned an undivided one-half interest in the land described in their answers and that they purchased said property for a valuable consideration in good faith and that in good faith they made the improvements thereon to the reasonable value of \$2,235.00, all of which was in open court admitted as being correct by plaintiff's counsel.

On behalf of the defendants Widergren and Anderson it was proved that all taxes on said property claimed by the defendants, Widergren and Anderson were paid for the year 1909 by the Coleman-Fulton Pasture Company, and for each year thereafter down to and including the year 1914, each year as they accrued by the owners of said property. The same evidence was offered with reference to the lands claimed by the defendant, A. Sivers, except that the receipt shows that the taxes for 1911 were paid March 28th, 1912, and that the taxes for 1912, were paid March 10th, 1913.

W. E. SCHMALSTEIG, one of the defendants, testified as follows:

"I know where the Widergren and Anderson 160 acres is out there, in fact I am living on that now. It was fenced some ago and ever since then has been kept up. I and Mr. Gibson have looked after it. Widergren and Anderson do not live in this State. A part of it was cultivated last year."

P. N. PULLIN, one of the defendants, testified:

"I own the east half of Fraction- Section No. 56 of the Geo. H. Paul Subdivision. I bought it in 1913, paying \$65.00 an acre for it, paying \$5,710.00 cash and executed my notes for the balance which I still owe. I built an addition to the house which was on it when I bought, which cost me \$350.00 and another house I have built which cost \$400.00 and I have fenced the land at a cost of \$50.00. 106 acres of the land has been grubbed."

177 The witness then testified and it was admitted by counsel for plaintiff in open court that he purchased said land in good faith for a valuable consideration and that he made the improvements in good faith and the land was fenced when he bought it.

Tax statements were then offered showing the payment of all taxes for the years 1909, 1910, 1911, 1912, 1913, and 1914, upon the property claimed by the defendant, Pullin, and that the taxes were paid in due and proper time by the owners of the property at the time of payment.

Witness HUBBEL, recalled, testified:

"The improvements were put upon the Pullin land in the latter part of 1910 and it was fenced in 1911."

J. V. TUMLINSON, being recalled, testified:

"I know where the land claimed by Mr. Pullin is now situated. I remember the Mexican going upon this land in 1910, for Mr. Daugherty, of Beeville. He had a little part of this land in cultivation and lived in a house on the land. From that time up to the time of the filing of this suit in May, 1914, the land has been continuously in cultivation."

On Examination by the Court, the witness testified:

"I ran a fence on the Houston south line connecting with the Pistola fence in 1905, enclosing about 2,000 acres for a horse pasture. I know that the Houston survey composed a part of the enclosure. I did not build any of the north and south line enclosing the 2,000 acres. I connected on the southwest corner of the Todd survey and the southeast corner of the Houston survey, I ran west and connected up with the Pistola fence. The Pistola fence then on the west ran north to the railroad and connected up with the railroad fence. The railroad fence on the north ran east to the farm fences that were put in by Mr. Warburton and
178 these farm fences ran on down and connected up with the Todd survey, making an entire enclosure. The fence I

built was about a mile long and the north and south fence was about two miles long. The Pistola fence and the railroad fence connected up and the farm fences built by Mr. Marburton and the railroad fences connected up and when I ran the fence from the Todd survey up to the Pistola it made a solid enclosure."

JAMES B. WELLS, a witness for the defendants, testified as follows:

"My name is James B. Wells and I live in Brownsville, Texas. I am a lawyer. I am acquainted with the property known as the Coleman-Fulton Pasture Company, and have been acquainted with said property in a general way from 1870 or '71, about the time Coleman, Mathis & Fulton commenced buying up property and making a ranch. Beginning in 1870 and 1871 I have traveled back and forth over the pasture of Coleman, Mathis & Fulton a good deal, and I know well that about 1872 and '73 they completed the fence on the west of the Pistola pasture. That fence runs cross ways of the Pistola Mott and the Chiltipin Creek, striking the Chiltipin about where the Casua ranch is situated. A short time after that, a year or two, they built another fence across the pasture below the Pistola fence, commencing at what is known as the Doyle Water Hole and ran north clear across the pasture of the Chiltipin."

Witness was then shown a map of the entire pasture and identified the Doyle Water Hole fence as being that beginning at the Chiltipin at T. M. Coleman's ranch and running south to the Doyle Water Hole on Gum Hollow, and stated that that was the fence which he had spoken of as having been built a year or two after the Pistola fence was built in '72.

179 "After these fences were put up that was the first big pasture built in that country, and all the people, including my father who had a large stock of cattle running on the ranch and we got word among other stockmen whose cattle ranged over that country, to be there at the Casau Ranch on the Chiltipin, that Coleman, Mathis & Fulton had completed their pasture and were putting out all of the cattle except their own, and to be there and receive such cattle as the different owners might have, and they had a representative there, I know that every body's cattle were then taken out, except the Coleman, Mathis & Fulton. From that time on down I don't think any one besides Coleman, Mathis & Fulton and their successors have used this pasture. I went to Brownsville in 1878, but from 1872 to '78 I was more or less frequently through this pasture. We took all of our cattle either to San Antonio or to Rockport and we had to go through that pasture to get over there from the east and I drove a great many cattle through there. In the fall of 1873 we had a contract with the Coleman-Fulton Pasture Company to deliver them 8,000 fat beeves and we did so. I remember the improvements at the old Pistola Mill and Mott. We had occasion to use them often, in the early days. All of our travel was then on horseback and I went out from Rockport to Borden's land in San Patricio County and went right by these improvements. The

main road was just outside the Pistola fence and that road took us on through the pasture and through the gate of the Doyle Water Hole Fence and the gate in the Pistola fence was some 300 or 400 yards from those improvements and this gate let us into the Cross pasture.

180

Defendants' Bill of Exception No. One.

Thereupon counsel for defendant asked the witness, James B. Wells, whether or not he was familiar with the facts as to whether or not people owning land in those days upon the water front recognized the bay as barriers. To, which question and answer sought to be elicited, counsel for plaintiff objected, which objection the court sustained, and to which ruling of the court the defendants then and there in open court excepted and showed that they expected to prove by said witness that the Nueces and Corpus Christi and other bays were generally used by people owning land in that section as barriers for pasture. And the defendants now here tender their bill of exceptions and ask that the same be signed, sealed and allowed, which is accordingly done.

Defendants' Bill of Exception No. Two.

(Thereupon defendants asked the witness the following question:

Q. State whether or not land owners put up fences along the bay front in those days as barriers against cattle." To which question and the answer sought to be elicited thereby counsel for plaintiff objected on the ground that the same was irrelevant and immaterial, which objection the Court sustained and thereupon defendants in open court duly excepted to the ruling of the court, and showed that they expected to prove by the said witness the fact that then owners did not put up fences along the bay fronts as barriers against cattle. And the defendants now here tender their bill of exception and ask that the same be signed, sealed and allowed, which is accordingly done.

The witness then testified that he was acquainted with the pastures up and down the bay front in the locality in which the
181 lands belonging to the Coleman-Fulton Pasture Company were located.

Defendants' Bill of Exception No. Three

Thereupon counsel for defendants asked the witness James B. Wells, the following question:

"Please state whether or not on these other pastures any fences were put along the bay front?"

To which question counsel for plaintiff objected upon the ground that the same was irrelevant and immaterial, which objection the Court sustained, to which ruling of the Court the defendants then

and there in open court excepted and showed that they excepted to prove by the witness that fences were not put up along the bay front on other pastures fronting on the bays. And defendants now here tender this their bill of exception and ask that the same be signed, sealed and allowed, which is accordingly done.

On cross-examination, the witness testified:

"I live in Brownsville, 150 miles away from the land in question, having moved there in 1878 and up until about ten years ago the only way to get out of this country was over land and I made trips occasionally. Corpus Christi was in our Judicial District and I came to Corpus Christi frequently to court. Never came over to San Patricio County unless I had business."

JOS. F. GREEN, being recalled, testified:

"In 1902 when we fenced the Todd survey I asked permission of the S. A. & A. P. Ry. Co. to connect up with their right-of-way fence. As I remember, I asked the president of the road. I always notify the section men in charge when I want this permission. When we built the first farms testified to by Mr. Warburton I then
182 asked to put in gates on what was called the farm gates, and asked permission to connect with their line of fences, which was granted. The San Antonio & Aransas Railway Company has never objected or complained of my connecting our fences with their right-of-way fences."

Defendants then offered in evidence a statement showing all taxes to have been paid on the 1280 acres of the Sam Houston survey involved in this suit, beginning with the year 1889 down to and including 1907 on the entire tract, and showing the payment of taxes from 1909 down to and including the year 1914 on 152 acres which was the land left after the sales in 1908. All of the original receipts were introduced in evidence and were admitted by counsel for plaintiff to be correct and to show the taxes to have been paid each year as they accrued by the Coleman-Fulton Pasture Company and before they became delinquent.

JOS. F. GREEN, then further testified as follows:

I was Superintendent and manager of the affairs of the Coleman-Fulton Pasture Company in 1908 and I know of my own knowledge that the taxes on the 1280 acres of the Sam Houston Survey involved in this suit were paid for the year 1908 when same became due and before they became delinquent."

On cross-examination, the witness testified:

"I have an independent recollection of having paid the taxes on the Sam Houston Survey in 1908. The memorandum of the tax receipt is with our papers here. The tax receipt itself, however, has been misplaced. I have never allowed any of the taxes on the property of the Coleman-Fulton Pasture Company to become delinquent. We have paid them every year since I have been with the company

prior to the last day of January. I know as a matter of fact that these taxes were paid before the last day of January of the 183 year in which they became payable and I know that because we have never allowed the taxes to become delinquent on a single piece of land.

With reference to connecting with the railroad right-of-way fence of the Aransas Pass Railroad, whenever I desired to do so I would go to the agent and ask permission to do it and he would always communicate by wire with the management of the road and they would always grant permission.

It was agreed in open court between counsel for plaintiff and counsel for the defendant, Alice State Bank, that the Alice State Bank purchased the 160 acres claimed by it and involved in this suit and which is the northeast quarter of Section 41 of the Geo. H. Paul Subdivision, and that they acquired whatever right and interest the Coleman-Fulton Pasture Company had in the land, and they then offered in evidence copies of the court proceedings had in a suit brought by the Coleman-Fulton Pasture Company against W. L. Dusenbery and others in the District Court of San Patricio County, Texas, foreclosing a vendor's lien upon the 160 acres claimed by the Alice State Bank, which lien was foreclosed and the land sold at sheriff's sale and purchased at this sale by the Alice State Bank for the sum of \$3,000.00, that being the highest and best bid for same. The sheriff's deed was dated December 2nd, 1913, and was filed for record on December 2nd, 1913, and duly recorded in Vol. 51 in the Deed Records of San Patricio County, Texas.

It was then agreed in open court between counsel for plaintiff and counsel for defendants that the defendant, Coleman-Fulton Pasture Company is a corporation duly incorporated under the laws of the state of Texas and was so incorporated at the time of the deeds to it by Coleman & Fulton, conveying the land in question.

A certificate from the Tax Collector of San Patricio County, Texas, was then offered in evidence showing that the taxes 184 for the year 1908 was paid by the Coleman-Fulton Pasture Company upon the 1280 acres of land involved in this suit. Defendants then rested.

Counsel for plaintiff then offered in evidence a certified copy from the Comptroller's Office of the State of Texas showing that for the year 1909 the Coleman-Fulton Pasture Company assessed for taxation 152 acres of the Sam Houston Survey and a like assessment for the year 1910.

This concluded the testimony, and the foregoing constitutes all the testimony in the case, affecting the parties and their privies suing out the writ of error.

Thereupon the defendants, (before the court charged the jury) presented to the court and requested the court to give their special charges Number one to nineteen, inclusive, as follows:

Defendants' Bill of Exceptions No. Four.

The defendants requested the court to give their special charge No. 1, which (caption and signature omitted) reads:

"The Statutes of this state provide that every suit to be instituted to recover real estate, as against any person in peaceable and adverse possession thereof under title, shall be instituted within three years next after the cause of action shall have accrued, and not afterward. In this connection you are instructed that the instruments constituting the chain of title of the defendants and introduced in evidence by them are sufficient to show such title.

'Peaceable possession' is such as is continuous and not interrupted by adverse suit to recover the estate.

'Adverse possession' is an actual and visible appropriation of the land commenced and continuing under a claim of right inconsistent with and hostile to the claim of another.

Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them.

In this connection you are instructed that the instruments constituting the defendant's chain of title and introduced in evidence by them are sufficient to show such privity of estate between defendants and those under whom they claim.

Therefore, you are instructed that if you believe from the evidence that the defendants and those under whom they claim, have had peaceable and adverse possession of the Sam Houston survey in controversy under title, for a period of three consecutive years at any time between June 22, 1874, and May 30, 1914, then you should return a verdict for the defendants, unless you find for plaintiff under other instructions given you."

The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court accepted.

And the defendants now here tender this, their bill of exceptions No. 4 to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Five.

The defendants requested the court to give their special charge No. 2, which (caption and signature omitted) reads:

"The statutes of this state provide that every suit to be instituted to recover real estate, as against any person in peaceable and adverse possession thereof under color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterward.

In this connection you are instructed that by 'color of title' is meant a consecutive chain of such transfer down to such person in possession, without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or

be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty; or when the party in possession shall hold the same by certificate of headright, land warrant, or land scrip, with a chain of transfer down to him in possession.

In this connection you are further instructed that the instruments constituting the chain of title of the defendants are sufficient to show such color of title.

'Peaceable possession' is such as is continuous and not interrupted by adverse suit to recover the estate.

'Adverse possession' is an actual and visible appropriation of the land commenced and continuing under a claim of right inconsistent with and hostile to the claim of another.

Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them. In this connection you are instructed that the instruments constituting the chain of title of defendants and introduced in evidence by them are sufficient to show such privity of estate between them and those under whom they claim.

Therefore you are instructed that if you believe from the evidence that the defendants, and those under whom they claim, have had peaceable and adverse possession of the Sam Houston Survey in controversy under color of title, for a period of three consecutive years at any time between June 22, 1874, and May 30, 1914, then you should return a verdict for defendants, unless you find for plaintiffs under other instructions given you."

187 The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

And the defendants now here tender this, their bill of exception No. 5 to such action and ruling of the court and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Six.

Defendants requested the court to give their special charge No. which (caption and signature omitted) reads:

"The statutes of this state provide that every suit to be instituted to recover real estate, as against any person having peaceable and adverse possession thereof, cultivating, using and enjoying the same and paying taxes thereon, if any and claiming under deed or deed duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterward. In this connection you are instructed that by the term 'deed or deeds duly registered' is meant such deeds as those constituting the chain of title of the defendants that have been introduced by them, and which have been recorded in the deed records of the County in which the land thereby conveyed is situated.

'Peaceable possession' is such as is continuous and not interrupted by adverse suit to recover the estate.

'Adverse possession' is an actual and visible appropriation of the land commenced and continuing under a claim of right inconsistent with and hostile to the claim of another.

Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them.

In this connection you are instructed that the deeds constituting the chain of title of the defendants and introduced in evidence by them show such privity of estate between them and those under whom they claim.

Therefore, if you believe from the evidence that the defendants, and those under whom they claim, have had peaceable and adverse possession of the Sam Houston Survey in controversy, cultivating, using and enjoying the same, and paying taxes thereon, and claiming under a deed or deeds duly registered, for a period of five consecutive years at any time between the 26th day of August, 1879, and the 30th day of May, 1914, then you should return a verdict for the defendants unless you find for the plaintiff under other instructions given you."

The court refused said request, to which action and ruling of the Court the defendants, and each of them, at the time in open court accepted.

And the defendants now here tender this, their bill of exceptions No. 6 to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exception No. Seven.

Defendants requested the court to give their special charge No. 4, which (caption and signature omitted) reads:

"The statutes of this state provide that any person who has a right of action for the recovery of any land against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward.

'Peaceable possession' is such as is continuous and not interrupted by adverse suit to recover the estate.

'Adverse possession' is an actual and visible appropriation of the land commenced and continuing under a claim of right inconsistent with and hostile to the claim of another.

Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them.

In this connection you are instructed that the deeds constituting the chain of title of the defendants and introduced in evidence by them show such privity of estate between them and those under whom they claim.

Therefore, you are instructed that if you believe from the evidence that the defendants, and those under whom they claim, have had peaceable and adverse possession of the Sam Houston Survey in

controversy, cultivating, using or enjoying the same, for a period of ten consecutive years at any time between June 22nd, 1874, and May 30th, 1914, then you should return a verdict for the defendants, unless you find for plaintiff under other instructions given you."

The court refused the said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

And the defendants here and now tender this, their bill of exceptions No. 7 to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Eight.

The defendants requested the Court to give their special charge No. 5, which (caption and signature omitted) reads:

"You are instructed that upon the issue of adverse possession of land under a defense of title by limitation it is not necessary that the proof should show the land to have been enclosed on every side by an artificial enclosure, but, as regards enclosures, a natural barrier in part may be shown to have been utilized, provided it be of such a character as, in connection the fence, will constitute a substantial enclosure of the land, and provided it is sufficient to indicate
190 dominion over the premises and give notoriety to the claim of possession and title. The natural barriers in such case must be so used in connection with the artificial barriers as to indicate that they are relied on by the user thereof to enclose the land and to keep out persons desiring access thereto."

The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

And the defendants here now tender this, their bill of exceptions No. 8 to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Nine.

The defendants requested the court to give their special charge No. 5, which (caption and signature omitted) reads:

"You are instructed that under the defense of limitation of five years it is not necessary that the proof show the land to have been fenced, but it is sufficient if the person in possession thereof and his predecessors with whom he has privity of estate, have had peaceable and adverse possession thereof, cultivating, using or enjoying the same or some part thereof, paying taxes thereon and claiming under deed or deeds duly registered for five years continuously at some time before the institution of this suit."

The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted because the evidence raises the issue covered by said request.

the evidence showing and tending to show the facts submitted by the request; and, in case the jury found the facts as so submitted, the defendants would be entitled as a matter of law to a verdict in their favor under the five years statute of limitations.

191 And the defendants now here tendered this, their bill of exceptions No. 9, to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Ten.

The defendants requested the court to give their special charge No. 7, which (caption and signature omitted) reads:

"You are instructed that plaintiff has not acquired the undivided one-eighth interest of Temple Houston in the estate of Sam Houston; and, therefore, as to an undivided one-eighth interest of the land in controversy you will return a verdict for defendants."

The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

And the defendants now here tender this, their bill of exceptions No. 10, to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Eleven.

The defendants requested the court to give their special charge No. 8, which (caption and signature omitted) reads:

"If you believe from the evidence that the land in controversy was by defendants or their predecessors and privies in title, inclosed by fence on three sides, and bounded by water on the other side, and that the water was of such nature and depth as to constitute a barrier on such fourth side, then this would constitute a sufficient enclosure under the defense of ten years limitation. And if you find that such enclosure was peaceable, adverse, and continuously maintained by such parties, or any of them, for ten years at any time prior to the bringing of this suit, and that during such time they, or any
192 of them, cultivated, used or enjoyed such land you will find in favor of defendants, unless you find that during such particular ten years some of the heirs of Sam Houston were married women with husbands living, in which latter case you will be governed in your findings by the court's charge on the effect of marriage of a woman upon the running of limitation."*

The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

And the defendants now here tender this, their bill of exceptions No. 11, to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Twelve.

The defendants requested the court to give their special charge No. 9, which (caption and signature omitted) reads:

"You are further instructed that limitation, as in the court's charge defined, could not run against a married woman with living husband before July 29, 1896, unless it began to run before she was married, in which latter case it could continue to run against her. You are further instructed that limitation could run against a married woman after July 29, 1896.

If you find that limitation could not run under this charge as to some one or more of the heirs of Sam Houston, you will not find in favor of the defendants on the issue of limitation as to the proportionate interest in said land claimed by such heir or heirs, keeping in mind that they each claim an undivided one-eighth of any estate left by their father."

The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

193 And the defendants now here tender this, their bill of exceptions No. 12, to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Thirteen.

Defendants requested the court to give their special charge No. 10, which (caption and signature omitted) reads:

"You are further instructed that the open, visible and notorious exercise of the rights of ownership of land of such a nature and character as to constitute notice to the world of a hostile claim of ownership, by one claiming title to the land under a deed duly registered, is sufficient to constitute the adverse possession required by the five years statute of limitation, and this is true without regard to whether any, or what part, of the land is actually enclosed, or the character of the enclosure, if any."

The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

And the defendants now here tender this, their bill of exceptions No. 13, to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Fourteen.

Defendants requested the court to give their special charge No. 11, which (caption and signature omitted) reads:

"If you find from the evidence that the defendant Coleman-Fulton Pasture Company, claiming under a deed duly registered and

covering the land in question, entered upon and made improvements on a part thereof, and further enclosed a part thereof by fence, then I charge you that the possession of the Coleman-Fulton Pasture Company extends to the boundaries of the land in question, as shown in the deed. As to the part of the land enclosed and improved it was in actual possession, and as to the part not enclosed it was in constructive possession."

The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

And the defendants here now tender this, their bill of exceptions No. 14 to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Fifteen.

Defendants requested the court to give their special charge No. 12, which (caption and signature omitted) reads:

"The open and notorious exercise of the right of ownership of land, of such nature and character as to constitute notice to the world of a hostile claim of ownership by one claiming title to the land under deed duly registered, is sufficient to constitute the adverse possession required by the five years statute of limitations, and this is true without regard to whether any, or what part, of the land is actually enclosed or the character of the enclosure, if any."

The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

And the defendants here now tender this, their bill of exceptions No. 15, to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

195 *Defendants' Bill of Exceptions No. Sixteen.*

Defendants requested the court to give their special charge No. 13, which (caption and signature omitted) reads:

"The deed to the Coleman-Fulton Pasture Company, to the Sam Houston Survey in controversy is the kind of deed required by the five (5) years statute of limitations, and was duly registered on June 10th, 1881."

The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

And the defendants here now tender this, their bill of exceptions No. 16 to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Seventeen.

Defendants requested the court to give their special charge No. 14, which (caption and signature omitted) reads:

"The undisputed evidence shows that the Coleman-Fulton Pasture Company, and those under whom it claims, paid all taxes on the land in controversy claimed by them, as required by the five (5) years statute of Limitations."

The court refused said requests, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

And the defendants now here tender this, their bill of exceptions No. 17, to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Eighteen.

Defendants requested the court to give their special charge No. 15, which (caption and signature omitted) reads:

"The undisputed evidence shows that the possession (if any) of the Coleman-Fulton Pasture Company, and those under whom it claims, of the land in controversy claimed by them, was the peaceable possession, required by the Statute of Five (5) years statute of Limitations."

The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

And the defendants now here tender this, their bill of exceptions No. 18, to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Nineteen.

Defendants' requested the court to give their special charge No. 16, which (caption and signature omitted) reads.

"The undisputed evidence shows that the possession (if any) of the Coleman-Fulton Pasture Company, and those under whom it claims, of the land in controversy claimed by them, was commenced and continued under a claim of right inconsistent with and hostile to the claim of another, as required by the five (5) years statute of Limitations; and you are instructed that their possession (if any) of the land in controversy claimed by them, was the adverse possession required by the said statute, if it was of such character as to amount to an actual and visible appropriation of the said land. It was not necessary for the land, or any part thereof, to be actually enclosed to constitute such appropriation; it is sufficient if the

land was actually used and occupied, for the five (5) years required by the Statute, in such way as to make such use and occupation visible and notorious and to constitute Notice to the world of the

hostile claim to the land of those so using and occupying and using the same."

The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

And the defendants here now tender this, their bill of exceptions No. 19, to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Twenty.

Defendants requested the court to give their special charge No. 17, which (caption and signature omitted) reads:

"Possession of that part of the Sam Houston Survey in controversy, that is included within the Cruz pasture, by the Coleman-Fulton Pasture Company, and those under whom it claims and also its assignees, from the time same was enclosed in said Cruz pasture, was the peaceable and adverse possession required by the five (5) years statutes of Limitations.

Such peaceable and adverse possession of that part of such survey enclosed in the Cruz Pasture constituted the peaceable and adverse possession of the balance of the said Survey that is required by the five (5) years Statute of Limitations."

The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

108 And the defendants here now tender this, their bill of exceptions No. 20, to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Twenty-One.

Defendants requested the court to give their special charge No. 18, which (caption and signature omitted) reads:

"Possession of that part of the Sam Houston Survey in controversy, that is included within the Cruz Pasture by the Coleman-Fulton Pasture Company, and those under whom it claims and also its assignees, from the time same was enclosed in said Cruz Pasture, was the peaceable and adverse possession required by the Five (5) years Statute of Limitations."

The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

And the defendants here now tender this, their bill of exceptions No. 21, to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Defendants' Bill of Exceptions No. Twenty-Two.

Defendants requested the court to give their special charge No. 19, which (caption and signature omitted) reads:

"The possession of that part of the Sam Houston Survey in controversy that was enclosed by the fence built by Tumlinson for the Coleman-Fulton Pasture company in 1905, was the peaceable and adverse possession of all that part of said Survey included within the enclosure constructed by the said Tumlinson from the time the said enclosure was completed."

The court refused said request, to which action and ruling of the court the defendants, and each of them, at the time in open court excepted.

And the defendants here now tender this, their bill of exception No. 22, to such action and ruling of the court, and ask that the same be approved, sealed and allowed, which is accordingly done.

Each and all of said special charges were requested by the defendants and were refused by the court and exceptions to the refusal thereof taken by the defendants and allowed by the court, all as above shown, after the evidence in the case was closed and before the court charged the jury, all in open court and in the presence of the jury.

Thereupon the court proceeded to charge the jury orally, instructing them to return a verdict for the plaintiff for those parts and portions of the Sam Houston survey in controversy claimed by the defendants, T. N. Pullen, Jno. A. Anderson, Frank L. Widergren, Alice State Bank in their answers filed herein, and the jury in obedience to said instruction returned their verdict in favor of plaintiff as to said parts and portions of said Sam Houston Survey in controversy so claimed by the said defendants T. N. Pullen, Jno. A. Anderson, Frank L. Widergren and Alice State Bank, their verdict being (under further instruction by the court) in favor of the other defendants as to the other parts and portions of said Sam Houston survey in controversy.

Defendants' Bill of Exceptions No. Twenty-Three.

In the course of said charge given by the court to the jury the court instructed the jury as follows:

"In this case the Court reaches the conclusion, and you are advised that by reason of the Special Act of the Legislature passed July 22, 1870, being an 'An Act for the relief of the heirs of General Sam Houston,' and in pursuance of the location and survey of the land in question and patent by the Governor of the State of Texas to the heirs of General Sam Houston, and to their heirs and their assigns, that the legal title to the 1280 acres of land in question is in the Plaintiff in this case, and the plaintiff is entitled to recover all of said 1280 acres of land, less such parts

thereof, as may have been acquired by one or more of the defendants by reason of the Statute of Limitation."

At the time said charge an instruction above quoted was given to the jury by the court, the defendants, and each of them, in open court and in the presence of the jury and before the jury had considered or returned their verdict, duly excepted to said portion of said charge and instruction.

Defendants' Bill of Exceptions No. Twenty-Four.

And the court in the course of said charge that was given to the jury further instructed the jury as follows:

"I will say to you, that the attitude of the court in disposing of the case is directed and controlled by a case decided by the Circuit Court of Appeals of this Circuit, in October 1905 and reported in 140 Federal Reporter, the style of the case being Hyde vs. McFadden. The land in litigation in that case—it being a case of trespass to try title—is situated near Beaumont in Jefferson County, Texas. The case was reversed and rendered—that was the effect of the holding of the Circuit Court of Appeals. In that case there was about seven miles of water front. In this case there is a water front of fourteen miles, and the Court of Appeals for this Circuit, by whose judgment I am guided and controlled, in the discharge of my duty. The water front is held by that Court not to be such

a barrier as would put in motion the Statute of Limitation.

201 Therefore, the plaintiff in this case should recover such part of the Houston survey, which has not been defeated by adverse possession under the Statutes of Limitation of our State. It follows that the land, perhaps about one-third thereof, heretofore described as being in the 'Cruz Pasture' having no water front as a Barrier, but being entirely enclosed for the requisite length of time under the Statutes of Limitation, should be awarded to the several defendants claiming the same. The balance of the survey, not having been enclosed, according to the testimony offered by the defendants, to-wit: Mr. Tumlinson, until April 1905—this suit being filed in May 1914—the defendants are not entitled to recover under their pleas of adverse possession, the land claimed by the defendants and situated in what is known as the 'Pistola Pasture' should be awarded to the plaintiff, The Houston Pasture Company, by reason of the failure of the defendants to make good their pleas, except that part of said survey claimed by defendant, Gibson, amounting to 280.12 acres, and that part of said survey claimed by the defendant, The Coleman-Fulton Pasture Company, having the form of a triangle and containing 153.64 acres. Under the evidence it appears that that particular tract of land was enclosed under a separate fence, erected in the year 1903, and that said defendant has been in possession thereof sufficiently long to acquire title against plaintiff."

At the time the said charge and instruction quoted above was

given by the court to the jury, the defendants, and each of them, in the presence of the jury and before the jury had considered or returned their verdict, duly excepted to such portion of said charge and instruction.

Now in furtherance of justice and that right may be done, the defendants present the foregoing as their bills of exception and pray that the same may be settled, allowed and signed by the Judge, and made a part of the record, as provided by law, which is accordingly done, this the 23rd day of July, A. D. 1915.

W. T. BURNS, *Judge.*

"EXHIBITS A AND B."

(Here follow blue prints marked pp. 203 and 204.)

**BLUEPRINT
TOO
LARGE
FOR
FILMING**

205 Indorsement: D. L. No. 8. Houston Pasture Co. vs. Alice State Bank, et al. Defendants Bills of Exceptions. Filed July 23, 1915. L. C. Masterson, Clerk.

Assignments of Error.

In the District Court of the United States, for the Southern District of Texas, Corpus Christi Division.

No. D. L., 8. At Law.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

Now comes the defendants, Alice State Bank, Coleman-Fulton Pasture Company, E. Cubage, Frank L. Widergren, John A. Anderson, T. N. Pullen, J. C. Dougherty, J. W. Cook, S. J. Tipton, W. F. Traxler, in the above styled and numbered cause and file the following assignments of error as grounds for the reversal of the judgment of the District Court rendered in this case:

206 *Assignment of Error No. One.*

The court erred in refusing to permit the defendants to prove by the witness James B. Wells that he was familiar with the Nueces, Corpus Christi and other bays adjacent to the land in question, and that the same were used and recognized by owner of land in that section as barriers for pasture, as fully appears in defendants' bill of exceptions to the action of the court.

Assignment of Error No. Two.

The court erred in refusing to permit the defendants to prove by the witness James B. Wells that the owners of land fronting on the Nueces and Corpus Christi bays did not put up fences along the bay fronts as barriers against cattle, as fully appears in defendants' bill of exception to the action of the court.

Assignment of Error No. Three.

The court erred in refusing to charge the jury, as requested by the defendants in their special charge No. 1, which (caption and signature omitted) reads as follows:

"The statutes of this state provide that every suit to be instituted to recover real estate, as against any person in peaceable and adverse possession thereof under title, shall be instituted within three years next after the cause of action shall have accrued, and not afterward. In this connection you are instructed that the instruments consti-

tuting the chain of title of the defendants and introduced in evidence by them are sufficient to show such title.

'Peaceable possession' is such as is continuous and not interrupted by adverse suit to recover the estate.

'Adverse possession' is an actual and visible appropriation of the land commenced and continuing under a claim of right inconsistent with and hostile to the claim of another.

207 Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them.

In this connection you are instructed that the instruments constituting the defendants' chain of title and introduced in evidence by them are sufficient to show such privity of estate between defendants and those under whom they claim.

Therefore, you are instructed that if you believe from the evidence that the defendants and those under whom they claim, have had peaceable and adverse possession of the Sam Houston Survey in controversy under title, for a period of three consecutive years at any time between June 22, 1874, and May 30, 1914, then you should return a verdict for the defendants, unless you find for plaintiff under other instructions given you."

Because the evidence raises the issue covered by this request, there being evidence showing and tending to show (and sufficient to authorize and require a finding by the jury) that the defendants had held for more than three years prior to the filing of this suit, peaceable and adverse possession of the lands in controversy under title and that the instruments constituting the chain of title of the defendants are sufficient to show title and to show privity of estate between the defendants and those under whom they claim, and in case the jury found the facts as submitted by the request the defendants would be entitled to a verdict in their favor, as fully appears by defendants' bill of exception to the action of the court.

Assignment of Error No. Four.

The court erred in refusing to give to the jury special charge No. 2, requested by defendants, which (caption and signature omitted) reads as follows:

208 "The statutes of this state provide that every suit to be instituted to recover real estate, as against any person in peaceable and adverse possession thereof under color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterward.

In this connection you are instructed that by 'color of title' is meant a consecutive chain of such transfer down to such person in possession, without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty; or when the party in possession shall hold the same by certificate of headright, land warrant, or land scrip, with a chain of transfer down to him in possession.

In this connection you are further instructed that the instruments constituting the chain of title of the defendants are sufficient to show such color of title.

'Peaceable possession' is such as is continuous and not interrupted by adverse suit to recover the estate.

'Adverse possession' is an actual and visible appropriation of the land commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them. In this connection you are instructed that the instruments constituting the chain of title of defendants and introduced in evidence by them are sufficient to show privity of estate between them and those under whom they claim.

Therefore you are instructed that if you believe from the evidence that the defendants, and those under whom they claim, have had peaceable and adverse possession of the Sam Houston survey in controversy under color of title, for a period of three consecutive years at any time between June 22, 1874, and May 30th, 1914, then you should return a verdict for the defendants, unless you find for plaintiff under other instructions given you."

Because the evidence raises the issue covered by this request, there being evidence showing and tending to show (and sufficient to authorize and require a finding by the jury) that the defendants had held for more than three years prior to the filing of this suit, peaceable and adverse possession of the lands in controversy under color of title and that the instruments constituting the chain of title of the defendants are sufficient to show title and to show privity of estate between the defendants and those under whom they claim, and in case the jury found the facts as submitted by the request the defendants would be entitled to a verdict in their favor, as fully appears by defendants' bill of exception to the action of the court.

Assignment of Error No. Five.

The court erred in refusing to give to the jury special charge No. 3, requested by defendants, which (caption and signature omitted) reads as follows:

"The statutes of this state provide that every suit to be instituted to recover real estate, as against any person having peaceable and adverse possession thereof, cultivating, using and enjoying the same, and paying taxes thereon, if any, and claiming under deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterward. In this connection you are instructed by the term 'deed or deeds duly registered' is meant such deeds as those constituting the chain of title of defendants that have been introduced in evidence by them, and which have been recorded in the deed records of the County in which the land thereby conveyed is situated.

210 'Peaceable possession' is such as is continuous and not interrupted by adverse suit to recover the estate.

'Adverse possession' is an actual and visible appropriation of the land commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them.

In this connection you are instructed that the deeds constituting the chain of title of the defendants and introduced in evidence by them show such privity of estate between them and those under whom they claim.

Therefore, if you believe from the evidence that the defendants, and those under whom they claim, have had peaceable and adverse possession of the Sam Houston Survey in controversy cultivating, using and enjoying the same, and paying taxes thereon, and claiming under a deed or deeds duly registered, for a period of five consecutive years at any time between the 26th day of August, 1879, and the 30th day of May, 1914, then you should return a verdict for the defendants unless you find for the plaintiff under other instructions given you."

Because, the evidence raises the issues covered by said request, there being evidence showing and tending to show (and sufficient to authorize and require a finding by the jury) that defendants and each of them had and held for for more than five years prior to the filing of this suit, peaceable and adverse possession of the land in controversy cultivating, using and enjoying the same, and paying all taxes accruing thereon, and claiming same under deeds duly registered, such possession being continuous and not interrupted by adverse suit to recover the estate, and being such as to constitute an actual and visible appropriation of the land and to show that such possession and appropriation was commenced and continued

211 under a claim of right inconsistent with and hostile to the claim of another, and the record evidence in this case shows that the deeds constituting the chain of title of the defendants are such as are required by the five years statute of limitation, and that such deeds had been duly registered in the deed records of the county in which the land conveyed thereby was situated, and show privity of estate between the defendants and those under whom they claim; and in case the jury found the facts as submitted by the request defendants would be entitled to a verdict in their favor on the theory that they had acquired title to the land in controversy under the five years statute of limitations, as fully appears by defendants' bill of exception to the action of the court.

Assignment of Error No. Six.

The court erred in refusing to give to the jury special charge No. 4, requested by defendants, which (caption and signature omitted) reads as follows:

"The statutes of this state provide that any person who has

right of action for the recovery of any land against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward.

'Peaceable possession' is such as is continuous and not interrupted by adverse suit to recover the estate.

'Adverse possession' is an actual and visible appropriation of the land commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them.

212 In this connection you are instructed that the deeds constituting the chain of title of the defendants and introduced in evidence by them show such privity of estate between them and those under whom they claim.

Therefore you are instructed that if you believe from the evidence that the defendants, and those under whom they claim, have had peaceable and adverse possession of the Sam Houston Survey in controversy, cultivating, using or enjoying the same, for a period of ten consecutive years at any time between June 22, 1874, and May 30, 1914, then you should return a verdict for the defendants, unless you find for the plaintiff under other instructions given you."

Because the evidence raises the issue covered by said request, there being evidence showing and tending to show (and sufficient to authorize and require a finding by the jury) that defendants and each of them had and held for more than ten years prior to the filing of this suit, peaceable and adverse possession of the lands in controversy, cultivating, using and enjoying the same, such possession being continuous and not interrupted by adverse suit to recover the estate and being such as to constitute an actual and visible appropriation of the land and to show that such possession and appropriation was commenced and continued under a claim of right inconsistent with and hostile to the claim of another, and the record evidence in the case shows that the instruments constituting the chain of title of defendants show privity of estate between the defendants and those under whom they claim; and in case the jury found the facts as submitted by the request, the defendants would be entitled to a verdict in their favor on the theory that they had acquired title to the lands in controversy under the ten years statute of limitations, as fully appears by defendants' bill of exception to the action of the court.

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Assignment of Error No. Seven.

The court erred in refusing to give to the jury special charge No 5, requested by the defendants, which (caption and signature omitted) reads as follows:

"You are instructed that upon the issue of adverse possession of

land under a defense of title by limitation it is not necessary that the proff should show the land to have been enclosed on every side by artificial enclosure, but, as regards enclosures, a natural barrier in part may be shown to have been utilized, provided it be of such a character as, in connection with the fence, will constitute a substantial enclosure of the land, and provided it is sufficient to indicate dominion over the premises and give notoriety to the claim of possession and title? The natural barrier in such case must be so used in connection with the artificial barriers as to indicate that they are relied on by the user thereof to enclose the land and to keep out persons desiring access thereto."

Because the evidence raises the issue covered by said request, there being evidence showing and tending to show that the natural barrier that was utilized for a time, (in connection with fences on three sides), to enclose the lands in controversy was sufficient to constitute (in connection with such fences) a substantial enclosure and to indicate dominion over the premises and give notoriety to the claim of possession and title and that the natural barrier was relied on by the user thereof to enclose the land and keep out persons desiring access thereto, and, in case the jury found the facts as submitted by the request, the defendants were entitled as a matter of law to a finding that their possession of the land was adverse within the meaning of the statutes of limitation, as fully appears by defendants' bill of exception to the action of the court.

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Assignment of Error No. Eight.

The court erred in refusing to give to the jury special charge No. 8, requested by defendants, which (caption and signature omitted) reads as follows:

"You are instructed under the defense of limitation of five years it is not necessary that the proof show the land to have been fenced, but it is sufficient if the person in possession thereof and his predecessors with whom he has privity of estate, have had peaceable and adverse possession thereof, cultivating, using or enjoying the same, or some part thereof, paying taxes thereon and claiming under deed or deeds duly registered for five years continuously at some time before the institution of this suit."

Because the evidence raises the issue covered by said request, the evidence showing and tending to show that facts submitted by the request; and, in case the jury found the facts as so submitted, the defendants would be entitled as a matter of law to a verdict in their favor under the five years statute of limitations, as fully appears by defendants' bill of exception to the action of the court.

Assignment of Error No. Nine.

The court erred in refusing to give to the jury special charge No. 7, requested by defendants, which (caption and signature omitted) reads as follows:

"You are instructed that plaintiff has not acquired the undivided

one-eighth interest of Temple Houston in the estate of Sam Houston; and, therefore, as to an undivided one-eighth interest of the land in controversy you will return a verdict for defendants."

Because the undisputed evidence shows that Temple Houston was one of the eight children of Sam Houston and as such inherited a one-eighth interest in his estate and that the said Temple and his heirs never conveyed to plaintiff or any one else his or

215 their said one-eighth interest in said estate or any part thereof; and, such being the facts, plaintiff is not in any event entitled to recover the said one-eighth interest of Temple Houston and his heirs; plaintiff, having failed to prove title to said one-eighth interest in said estate by the said Temple Houston, is not entitled to recover said one-eighth interest, the same having never been conveyed to plaintiff and the heirs of said Temple Houston having refused to convey same to plaintiff and to join plaintiff in this suit and this suit not being brought by plaintiff as co-tenant with said heirs to recover the entire estate in said land and the defendants and those under whom they claim having been in possession of said land, under claim of right and title acquired by them from the executor of the estate of the said Sam Houston for more than thirty years, as fully appears by defendants' bill of exception to the action of the court.

Assignment of Error No. Ten.

The court erred in refusing to give to the jury special charge No. 8, requested by defendants, which (caption and signature omitted) reads as follows:

"If you believe from the evidence that the land in controversy was by defendants or their predecessors and privies in title, inclosed by fence on three sides, and bounded by water on the other side, and that the water was of such nature and depth as to constitute a barrier on such fourth side, then this would constitute a sufficient enclosure under the defense of ten years' limitation. And if you find that such enclosure was peaceable, adverse, and continuously maintained by such parties, or any of them, for ten years at any time prior to the bringing of this suit, and that during such time they, or any of them, cultivated, used or enjoyed such land you will find in favor of defendants, unless you find that during such particular ten years some of the heirs of Sam Houston were 216 married women with husbands living, in which latter case you will be governed in your findings by the court's charge on the effect of marriage of a woman upon the running of limitation."

Because the evidence raises the issue covered by such request, and shows and tends to show that the water of the bay or gulf that was utilized, (in connection with fences on three sides), to enclose for a time the land in controversy was of such nature and depth as to constitute a barrier on that side of the enclosure; and, if the facts were as submitted by the request, then as a matter of law the

said fences and water barrier constituted the enclosure required by the ten years' statute of limitations, as fully appears by defendants' bill of exception to the action of the court.

Assignment of Error No. Eleven.

The court erred in refusing to give special charge No. 9, requested by defendants, which (caption and signature omitted) reads as follows:

"You are further instructed that limitation, as in the court's charge defined, could not run against a married woman with living husband before July 29, 1896, unless it began to run before she was married, in which latter case it could continue to run against her. You are further instructed that limitation could run against a married woman after July 29, 1896.

If you find that limitation could not run under this charge as to some one or more of the heirs of Sam Houston, you will not find in favor of the defendants on the issue of limitation as to the proportionate interest in said land claimed by such heir or heirs, keeping in mind that they each claim an undivided one-eighth of any estate left by their father."

Because the said request correctly instructs the jury as to the law on a material issue made by the pleadings and the evidence, it being the law as therein stated that the statutes of limitation would run against a married woman after July 29, 1896, and would run not against persons laboring under such disability prior to that date unless the same had begun to run against such person before they were married, and the evidence being such as to raise the issue of fact covered by the request, as fully appears by defendants' bill of exception to the action of the court.

Assignment of Error No. Twelve.

The court erred in refusing to give to the jury special charge No. 10, requested by defendants, which (caption and signature omitted) reads as follows:

"You are further instructed that the open, visible and notorious exercise of the rights of ownership of land of such a nature and character as to constitute notice to the world of a hostile claim of ownership, by one claiming title to the land under a deed duly registered, is sufficient to constitute the adverse possession required by the five years statute of limitation, and this is true without regard to whether any, or what part, of the land is actually enclosed, or the character of the enclosure, if any."

Because the evidence shows and tends to show (and is sufficient to authorize and require a finding by the jury) that defendants and those under whom they claim openly, visibly and notoriously exercised all the rights of ownership of the land in controversy, claiming title thereto under deeds duly registered, in such way

and of such nature and character as to constitute notice to the world of the hostile claim of ownership to said land, for more than five years prior to the filing of this suit; and, in case the jury so found the facts as submitted by said request and as warranted by the evidence, such facts constituted the adverse possession required by the five years statute of limitations, and as
218 matter of law the exercise of such right under the circumstances submitted would be sufficient to constitute such adverse possession without regard to whether any, or what part, of the land was actually enclosed, or the character of the enclosure, if any, all as submitted by the request, as fully appears by defendants' bill of exception to the action of the court.

Assignment of Error No. Thirteen.

The court erred in refusing to give to the jury special charge No. 11, requested by defendants, which (caption and signature omitted) reads as follows:

"If you find from the evidence that the defendant, Coleman-Fulton Pasture Company, claiming under a deed duly registered and covering the land in question, entered upon and made improvements on a part thereof, and further enclosed a part thereof by fence, then I charge you that the possession of the Coleman-Fulton Pasture Company extends to the boundaries of the land in question, as shown in the deed. As to the part of the land enclosed and improved it was in actual possession, and as to that part not enclosed it was in constructive possession."

Because the evidence shows and tends to show (and is sufficient to authorize and require a finding by the jury) that the defendant pasture company, claiming under a deed duly registered and covering the land in question, entered upon and made improvements on a part thereof and enclosed a part thereof by fence; and, the evidence raises the issue covered by the request, then as a matter of law the possession of the defendant pasture company extended to the boundaries of the land in question as shown by their deed, all as submitted by the request, as fully appears by defendant's bill of exception to the action of the court.

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Assignment of Error No. Fourteen.

The court erred in refusing to give to the jury special charge No. 12, requested by defendants, which (caption and signature omitted) reads as follows:

"The open and notorious exercise of the right of ownership of land, of such nature and character as to constitute notice to the world of a hostile claim of ownership by one claiming title to the land under deed duly registered, is sufficient to constitute the adverse possession required by the five years statute of limitations, and this is true without regard to whether any, or what part, of the land is actually enclosed or the character of the enclosure, if any."

Because the evidence shows and tends to show (and is sufficient to authorize and require a finding by the jury) that the defendants and those under whom they claim openly and notoriously exercised the rights of ownership of the land in question, of such nature and character as to constitute notice to the world of a hostile claim of ownership, claiming title to the said land under deeds duly registered, for more than five years prior to the filing of this suit; and, the evidence raising the issue submitted by the request, then as matter of law in case the jury so found the facts they would be sufficient to constitute the adverse possession required by the five years statute of limitations without regard to whether any, or what part, of the land was actually enclosed or the character of the enclosure, if any, all as submitted by the request, as fully appears by defendant's bill of exception to the action of the court.

Assignment of Error No. Fifteen.

The court erred in refusing to give to the jury special charge No. 13, requested by defendants, which (caption and signature omitted) reads as follows:

"The deed to the Coleman-Fulton Pasture Company, to 220 the Sam Houston Survey in controversy is the kind of deed required by the five (5) years statute of limitations, and was duly registered on June 10th, 1881."

Because the deed to the defendant pasture company to the land in controversy, introduced in evidence by the defendants, is in fact and in law the kind of deed required by the five years statute of limitations and was shown by the undisputed evidence to have been duly registered on June 10th, 1881; and, such being the case, the defendants as matter of law were entitled to have the jury so instructed as per said request, as fully appears by defendants' bill of exceptions to the action of the court.

Assignment of Error No. Sixteen.

The court erred in refusing to give to the jury special charge No. 14, requested by defendants, which (caption and signature omitted) reads as follows:

"The undisputed evidence shows that the Coleman-Fulton Pasture Company, and those under whom it claims, paid all taxes on the land in controversy claimed by them, as required by the five (5) years statute of limitations."

Because the undisputed evidence showed that the defendant pasture company, and those under whom it claims, paid all taxes on the land in controversy claimed by them, as required by the five years statute of limitations; and, such being the facts the defendants were entitled as matter of law to have the jury so instructed, as per said request, as fully appears by defendants' bill of exception to the action of the court.

Assignment of Error No. Seventeen.

The court erred in refusing to give to the jury special charge No. 15, requested by the defendants, which (caption and signature omitted) reads as follows:

221 "The undisputed evidence shows that the possession, (if any) of the Coleman-Fulton Pasture Company, and those under whom it claims, of the land in controversy claimed by them, was the peaceable possession required by the statute of five (5) years statute of limitations."

Because the undisputed evidence showed that the possession of the defendant pasture company, and those under whom it claims, of the land in controversy claimed by them, was the peaceable possession required by the five years' statute of limitations; and, such being the facts, the defendants were entitled to have the jury so instructed, as per said request, as fully appears by defendants' bill of exception to the action of the court.

Assignment of Error No. Eighteen.

The court erred in refusing to give to the jury special charge No. 16, requested by the defendants, which (caption and signature omitted) reads as follows:

"The undisputed evidence shows that the possession (if any) of the Coleman-Fulton Pasture Company, and those under whom it claims, of the land in controversy claimed by them, was commenced and continued under a claim of right inconsistent with and hostile to the claim of another, as required by the five (5) years' statute of limitations; and you are instructed that their possession (if any) of the land in controversy claimed by them, was the adverse possession required by said statute, if it was of such character as to amount to an actual and visible appropriation of the said land it was not necessary for the land, or any part thereof, to be actually enclosed to constitute such appropriation; it is sufficient if the land was actually used and occupied, for the five (5) years required by the statute, in such way as to make such use and occupation visible and notorious and to constitute notice to the world of the hostile claim to the
222 land of those so using and occupying and enjoying the same."

Because the undisputed evidence showed that the possession of the defendant pasture company, and those claiming under it, of the land in controversy claimed by them, was commenced and continued under a claim of right inconsistent with and hostile to the claim of another, as required by the five years' statute of limitations; and, such being the facts, the defendants were entitled as matter of law to have the jury so instructed, as per said request; and the evidence shows and tends to show (and was sufficient to authorize and require a finding by the jury) that the possession of the defendants and those under whom they claim was of such character as to amount to an

actual and visible appropriation of said land and to show that the land was actually used and occupied, for the five years required by the statute, in such way as to make such use and appropriation visible and notorious and to constitute notice to the world of the hostile claim to the land of those so using and occupying the same, the evidence showing that the defendants and those under whom they claim took actual possession of the land in controversy thirty years before the filing of this suit, claiming the same by fee simple title acquired from the estate of the original grantee of the bounty warrant to Sam Houston upon which the said land was patented, under deeds duly registered, and paid all taxes thereon accruing, having and holding peaceable and adverse possession of said land for more than thirty years before this suit was filed, having actually enclosed by fences and cultivated, used and enjoyed parts and portions of said land and having all of the said land enclosed with other lands under fences enclosing three sides and by natural water barrier of sufficient depth to prevent the ingress and egress of stock and the fences reaching such water barrier extending out into the water, and the defendants and those claiming under them having actually occupied the

223 said lands in controversy for more than thirty years constantly cultivating and pasturing the same and excluding all others from in any way using or occupying the said land or any part thereof, and exercising over said land during all of said time all the rights of ownership in such open, visible and notorious way as to constitute notice to the world of their hostile claim to said land, and the fences and barriers erected by them enclosing said land being of such nature and character as to constitute notice to the world of the adverse claim of ownership of the defendants; and, the evidence being as stated and as submitted by the request, the defendants were entitled as matter of law to have said issue submitted to the jury and on finding by the jury in their favor on said issue, to judgment in their favor on the theory that they had acquired title to said land by the five years statute of limitations, as fully appears by defendants' bill of exception to the action of the court.

Assignment of Error No. Nineteen.

The court erred in refusing to give to the jury special charge No. 17, requested by defendants, which (caption and signature omitted) reads as follows:

"Possession of that part of the Sam Houston survey in controversy, that is included within the Cruz Pasture, by the Coleman-Fulton Pasture Company, and those under whom it claims and also its assignees, from the time same was enclosed in said Cruz Pasture, was the peaceable and adverse possession required by the five (5) years statute of limitations.

Such peaceable and adverse possession of that part of such survey enclosed in the Cruz Pasture constituted the peaceable and adverse possession of the balance of the said survey that is required by the five (5) years statute of limitations."

Because the undisputed evidence shows that the possession by the defendant pasture company (and those under whom it claims and also its assignees) of that part of the Sam Houston Survey in controversy that is included within the Cruz Pasture (same being approximately one-third of the said survey) was the peaceable and adverse possession required by the five years statute of limitations, and that such possession was taken and held under deeds duly registered for more than five years before the filing of this suit and that the defendants and those under whom they claim paid all taxes accruing against said land during the time they so held possession; and, as matter of law and as submitted by the request, such peaceable and adverse possession of that part of said survey that was enclosed in the Cruz Pasture constituted the peaceable and adverse possession of the balance of said survey that is required by the five years statute of limitations, and the defendants were entitled to have the jury so instructed and to verdict and judgment in their favor, as such possession under the undisputed facts as shown by the evidence vested title in the defendants to all of the said survey under and by virtue of the said statute of limitations, as fully appears by the defendants' bill of exception to the action of the court.

Assignment of Error No. Twenty.

The court erred in refusing to give to the jury special charge No. 18, requested by the defendants, which (caption and signature omitted) reads as follows:

"Possession of that part of the Sam Houston Survey in controversy, that is included within the Cruz Pasture by the Coleman-Fulton Pasture Company, and those under whom it claims and also its assignees, from the time same was enclosed in said Cruz Pasture, was the peaceable and adverse possession required by the five (5) years statute of limitations."

Because the undisputed evidence shows that the possession of the defendant pasture company (and those under whom it claims and also its assignees) of that part of the Sam Houston Survey in controversy that is included within the Cruz Pasture, from the time same was enclosed in said Cruz Pasture, was the peaceable and adverse possession required by the five (5) years statute of limitations; and, such being the undisputed facts, the defendants were entitled to have the jury so instructed as per said request, as fully appears by defendants' bill exception to the action of the court.

Assignment of Error No. Twenty-One.

The Court erred in refusing to give to the jury special charge No. 19, requested by the defendants, which (caption and signature omitted) reads as follows:

"The possession of that part of the Sam Houston Survey in controversy that was enclosed by the fence built by Tumlinson for the Coleman-Fulton Pasture Company in 1905, was the peaceable and

adverse possession of all that part of said survey included within the enclosure constructed by the said Tumlinson from the time the said enclosure was completed."

Because the evidence raised the issue covered by the request and correctly instructed the jury as to the law upon said facts, as fully appears by the defendants' bill of exceptions to the action of the court.

Assignment of Error No. Twenty-two.

The court in that portion of its main charge to the jury which reads as follows:

"In this case the court reaches the conclusion, and you are advised that by reason of the Special Act of the Legislature passed July 22, 1870, being an 'Act for the relief of the heirs of General Sam Houston,' and in pursuance of the location and survey of the land in question and patent by the Governor of the State of Texas to the heirs of General Sam Houston, and to their heirs and 226 their assigns, that the legal title to the 1280 acres of land in question is in the plaintiff in this case, and the plaintiff is entitled to recover all of said 1280 acres of land, less such parts thereof, as may have been acquired by one or more of the defendants by reason of the Statute of Limitation."

Because (a) The said special act of July 22, 1870, if construed (as is done in said charge) as being intended to make a donation to the heirs of General Houston, would be unconstitutional and void. (b) The defendants and those under whom they claim having acquired title to the certificate mentioned by said special act by valid conveyance from the estate of General Houston, the validating act of March 31, 1881, inured to their benefit and vested title in them to the land in controversy located and patented by virtue of said certificate, and the said act had the effect to revive the original right to the 1280 acres of land granted by the original certificate issued in 1838; the said acts did not have the effect (as held in said charge) to donate 1280 acres of land to the heirs of General Houston, and did not inure to their benefit, and had the effect to vest title in said heirs subject to conveyances made by General Houston or by the executors of his estate. (c) The said special act is susceptible of the construction that it was intended to recognize and satisfy a valid and subsisting claim in favor of the estate of General Houston to 1280 acres of land and was not intended as a donation to his heirs; and, being susceptible of a construction that would make the act valid and constitutional, it should and will be presumed that the legislature intended that same should be so construed rather than that it should be construed as intending a donation which would have been unconstitutional and void.

(d) Said special act shows on its face that the same was not intended as a donation to the heirs of General Houston.

(e) The said special act expressly approves the original land co-

227 tificate issued to General Houston and declares the same to be a just claim from its original date in 1838, and thereby recognizes the same as a valid and subsisting claim against the State, and the proper legal inference is that the legislature found on inquiry that General Houston had in fact served in the Army of the Republic for a time sufficient to entitle him to 1280 acres of land, and that by mistake the warrant or certificate issued to him showed that he had not served for the requisite time to entitle him to that much land, and that the legislature passed the said act for the purpose of correcting said mistake.

(f) Said special act expressly approves the original land certificate issued to General Houston and declares the same to be a just claim from its original date in 1838, thereby evidencing that it was not the intention of the legislature to make a donation to his heirs.

(g) The said special act, and the undisputed evidence, shows that it was the intention of the legislature to validate the location made by General Houston by virtue of said certificate upon land in Polk County, by providing for the floating by the subsequent locator thereon of his location onto some other public land, said Polk county land so located by General Houston being inventoried as a part of his estate and subject to administration.

(h) The said special act did not direct that patent issue to the heirs of General Houston, but directed that it issue in the name of the said heirs, thereby evidencing the intention of the legislature that his heirs should take subject to any assignment made by him in his life time and subject to the administration of his estate; and the issuance thereafter of patent in the name of the heirs had the effect in law to vest title in those to whom the certificate and land located by virtue thereof had been duly transferred by the executor of the estate of General Houston, they being the remote vendees of the defendants.

228 (i) The words "heirs of" used in said special act and in the patent to the land in controversy are words of limitation, and have the effect to vest title in them only as heirs and subject to administration; and, the defendants having acquired the right and title to General Houston by valid conveyance from his estate, the rights granted by said act and the said patent are vested in them, in preference to the heirs of General Houston.

(j) By his services in the Army of the Republic, General Houston acquired by onerous title a valid and subsisting right to a part of the public land of the State, proportionate to the length of his service, as prescribed by the ordinances and laws under and by virtue of which the original warrant or certificate was issued in 1838; and said right was never lost or forfeited, and was vested in his estate at the time of the passage of said special act and could not be divested out of his estate by such act, and said right passed to the remote vendees of the defendants by valid conveyance from the executor of his estate, and the lands in controversy were located and patented by virtue of said original right so acquired by General Houston.

(k) The original right, which is the basis of the title to the lands in controversy, was acquired by General Houston by onerous title,

and was acquired after his death by the remote vendees of the defendants by valid conveyance from the executor of his estate, and the defendants could not be legally deprived of their title by act of the legislature.

(1) These facts are undisputed: General Houston served in the Army of the Republic in 1835 and 1836. Under the ordinances and laws of the Republic he acquired and was entitled to demand and receive, as compensation for his services, 960 acres of land if he served as much as nine months and 1280 acres if he served as much as twelve months. In 1838, warrant was duly issued to him for 1280 acres, but it was recited therein that he served from November, 1835, to October, 1836, less than twelve months. It is not questioned that he was entitled to at least 960 acres, but if he served only for the time stated in warrant he was not entitled to 1280 acres thereby granted to him. General Houston in his life time (in 185-) located the warrant on 1280 acres of land in Polk County. Subsequently, another certificate was located on the same land, presumably on the theory that the location of General Houston was void because the warrant was for more land than his services entitled him to. On General Houston's death in 1863, the land in Polk County was inventoried by his executors as a part of his estate. This was the situation when the special act of July 22, 1870, (upon which the charge and instruction in question is based), was passed, no patent having been issued either to General Houston or the subsequent locator to the land in Polk County. Subsequent to the passage of the special act, patent was issued to the subsequent locator to the land in Polk County, which had the effect of invalidating the prior location of General Houston on the same land. On July 22, 1871, the original bounty warrant issued to General Houston in 1838, was legally transferred and conveyed by the surviving executor of his estate to the remote vendees of the defendants. On August 25, 1872, the said warrant was located on the land in controversy by survey duly made and recorded. The transfer and conveyance to the remote vendees of the defendants was duly recorded on June 27, 1873. The patent to the land in controversy was issued to the heirs of General Houston on June 22, 1874, the grant being "To the heirs of Sam Houston, deceased, and their heirs and assigns forever." The remote vendees of the defendants, to whom the said original warrant was conveyed and transferred by the executor of General Houston's estate took possession of the land in controversy about the year 1873, and they and their vendees (including all the defendants herein) have ever since that time had and held continuous, peaceable and adverse possession of said land, cultivating, using and enjoying the same and having the same enclosed and actually and notoriously exercising over the same all the rights of ownership in such way as to give notice to the world of their hostile claim of title to the land, under and by virtue of deeds duly registered and having paid all taxes accruing thereon, as the same accrued. Such being the undisputed facts, the said charge and instruction of the court is erroneous in that title did not vest in the heirs of General Houston by virtue of the special act of July 22, 1870, as

held by the court, but on the contrary vested title in the defendants under and by virtue of the aforesaid rights, conveyances and facts stated.

(m) The effect of the charge is to deprive the defendants of their property in the land in controversy without due process of law, in violation of Section One of the Fourteenth Amendment to the Constitution of the United States in this: The plaintiff claims title to the land in controversy under conveyances from some of the heirs of Sam Houston; whose claim of title is based solely on the Act of July 22, 1870; and the court, by instructing a verdict for plaintiff on said issue, holds that the Legislature by said Act intended to divest (and divested) out of the estate of Sam Houston the right and title to the bounty warrant upon which the land in controversy was afterwards patented, and to vest (and vested) same in the heirs of said Houston, and intended to donate (and donated) to the said heirs the right and title to said bounty warrant and to the land afterward located and patented under and by virtue thereof, the same being the land in controversy. Such holding is in conflict with the laws of the State of Texas, and the settled line of decisions of the Courts of Last Resort of this State and has the effect to impair and destroy the defendants' defense that plaintiff can recover (if at all) only on proving title in himself, which rule of law is settled law in Texas, and constitutes and is a vested right of property; and such holding
 231 is further in conflict with said State laws and settled line of decisions in that the undisputed evidence established that the right and title to the said bounty warrant and to the land located and patented under and by virtue thereof, was vested in the Estate of Sam Houston and that these defendants have acquired and hold the said right and title to said bounty warrant and land; and the said instruction and holding of the court, that these defendants are not entitled to assert and maintain their said right and title so acquired, is in conflict with the laws and settled line of decisions of this State and have the effect to deprive the defendants of their property in said land, without due process of law, in violation of the said provision of the Constitution, as fully appears by defendants' bill of exception to the action of the court.

Assignment of Error No. Twenty-Three.

The court erred in that portion of its charge to the jury which reads as follows:

"I will say to you that the attitude of the court in disposing of the case is directed and controlled by a case decided by the Circuit Court of Appeals of this Circuit, in October, 1905, and reported in 140 Federal Reporter, the style of the case being *Hyde vs. McFadden*. The land in litigation in that case—it being a case of trespass to try title—is situated near Beaumont in Jefferson County, Texas. The case was reversed and rendered—that was the effect of the holding of the Circuit Court of Appeals. In that case there was about seven miles of water front. In this case there is a water

front of fourteen miles, and the Court of Appeals for this Circuit, by whose judgment I am guided and controlled, in the discharge of my duty. The water front is held by that Court not to be such a barrier as would put in motion the Statute of Limitations. Therefore, the plaintiff in this case should recover such part of the Houston Survey, which has not been defeated by adverse possession under the Statutes of Limitation of our State. It follows that the land, perhaps about one-third thereof, heretofore described as being in the 'Cruz Pasture' having no water front as a barrier, but being entirely enclosed for the requisite length of time under the Statutes of Limitation, should be awarded to the several defendants claiming the same. The balance of the survey, not having been enclosed, according to the testimony offered by the defendants, to-wit: Mr. Tumlinson, until April, 1905,—this suit being filed in May, 1904,—the defendants are not entitled to recover under their pleas of adverse possession, the land claimed by the defendants and situated in what is known as the 'Pistola Pasture' should be awarded to the plaintiff, the Houston Pasture Company, by reason of the failure of the defendants to make good their pleas, except that part of said survey claimed by defendant, Gibson, amounting to 280.12 acres, and that part of said survey claimed by defendant, The Coleman-Fulton Pasture Company, having the form of a triangle and containing 153.64 acres. Under the evidence it appears that that particular tract of land was enclosed under a separate fence, erected in the year 1903, and that said defendant has been in possession thereof sufficiently long to acquire title against plaintiff."

Because:

(a) The water barrier utilized by the defendant pasture company in enclosing the Pistola Pasture, (in which is situated the land awarded by the charge to plaintiff), is not (as stated in the charge) 14 miles in length, but is in fact as shown by the undisputed evidence approximately about one-half that distance in length.

(b) This case is not (as declared by the charge) ruled by *Hyde vs. McFadden* for that the facts of the cases are altogether different and especially so in respect to the matter of water barriers utilized, it appearing that in *Beaumont Pasture Company vs. Polk* (the facts in which case are stated in *Hyde vs. McFadden* to be substantially similar to the facts in that case) more than five-sixths of the barriers enclosing the large pasture in which the land in controversy was situated were natural barriers, consisting of bayous, lake, river and marsh, whereas in this case approximately only one-sixth of the barriers enclosing the Pistola Pasture in which the land in controversy awarded by the charge to plaintiff is situated, is a natural barrier, to-wit, the bay.

(c) The mere fact that the barrier on the south side of the Pistola Pasture in which is situated that part of the land in controversy awarded by the charge to plaintiff is a natural barrier, to-wit, the bay, and is about six or seven miles in length, does not make the enclosure of such character as not to meet the requirements of the statutes as to adverse possession; the evidence showing that the barrier

on the other three sides of the enclosure (constituting approximately five-sixths of the barriers around the land enclosed) consisted of fences, that the side fences extend out into the bay to where the water is of sufficient depth to prevent the ingress and egress of stock, that the water barrier on the south side is of sufficient depth and width to prevent the egress and ingress of stock, that the water barriers used by defendant pasture company to enclose said pasture is so used in connection with the said artificial barriers as to indicate and give notice to the world that the same is relied on to enclose the land and keep out persons desiring access thereto, that the adverse possession of the defendants and those under whom they claim of the land enclosed in the said pasture is and has been for the periods of limitation asserted by them actual and visible and such as to indicate clearly an assertion of claim of ownership of the land within the enclosure in themselves.

(d) The charge correctly instructs the jury that defendants have shown such possession of that part of the Houston survey lying in the Cruz Pasture as to vest title to the same in defendants
234 under the statutes of limitation; and, the defendants having had such possession of that part of the Houston survey lying in the Cruz Pasture as to acquire title thereto by limitation, their possession thereof is sufficient in law to vest title in them to the remainder of the survey, to-wit, that part thereof that is situated in the Pistola Pasture, the deed under which such possession was held covering and conveying the entire survey and being duly registered and all the other facts necessary to establish title by limitation being shown by the undisputed evidence.

(e) The evidence shows that a substantial part of the Houston Survey that lies in the Pistola Pasture was actually enclosed by defendants and those under whom they claim, and that substantial improvements were erected on said part of the survey by defendants and those under whom they claim, said enclosures consisting of substantial fences, and said improvements being substantial in character and consisting of houses, and of a mill, of a tank, of wells, and other like improvements; that said enclosures and improvements were maintained by defendants and those under whom they claim for the periods of limitation before the filing of this suit; that defendants and those under whom they claim actually occupied, used and enjoyed said improvements and actually cultivated the lands enclosed, for the periods of limitation prior to the filing of this suit; that their possession of said premises was taken and held under claim of right inconsistent with and hostile to the claim of all others under deeds duly registered; that said possession was the peaceable and adverse possession required by the statutes of limitation and said possession was actual and visible, and said possession and said enclosures and said improvements were of such character as to indicate clearly the assertion of claim of ownership in defendants and to give notice to the world of such adverse possession.

(f) The evidence shows: That the Sam Houston survey
235 in controversy was patented to the heirs of General Sam Houston on June 22, 1874, by virtue of bounty warrant No.

3894 for 1280 acres issued June 20, 1838, by the Secretary of War of the Republic to General Houston, the land being surveyed and located on August 25, 1872; that the said warrant was for military services rendered by General Houston, and the right thereto was acquired by him by onerous title, and that on his death in 1863 the same passed to and vested in his heirs subject to the provisions of his will and administration of his estate; that on July 22, 1871, the surviving executor of General Houston's estate legally transferred the said warrant to Coleman, Mathis & Fulton, the conveyance being duly recorded on June 27th, 1873; that defendants, by valid conveyances duly recorded, have acquired the title to the land in controversy so conveyed to Coleman, Mathis & Fulton, and have paid all taxes accruing on said lands as the same accrued; that in 1872 or 1873, Coleman, Mathis & Fulton took possession of the said Houston survey and enclosed the same and other lands in a large pasture; that, at the time the said pasture was enclosed, all stock belonging to other people that were running thereon was driven out of the pasture; that, ever since said time, Coleman, Mathis & Fulton, and their vendees have continuously used the land enclosed in said pasture (including the Houston survey) as a pasture in which to pasture large quantities of cattle and other stock, and have continuously so maintained the said enclosure as to exclude all other stock; that, during all said time, the possession and use of all of the land enclosed in said pasture (including the Houston survey) by Coleman, Mathis & Fulton and their vendees has been exclusive and hostile to and inconsistent with the claim of all others; that said occupants of the land in controversy actually enclosed parts of the same with substantial fences and actually erected thereon other substantial improvements, including a mill, a tank, houses, wells, pens, and other like improvements, more than thirty years before the filing of this suit, and maintained the same for a greater time than the periods of limitation before the filing of this suit, and during all said time actually cultivated the lands so enclosed, and actually occupied, used and enjoyed the said premises and all said improvements; that part of said improvement consisted of the actual enclosure with substantial fences all around the same of the western part of the Houston Survey, to-wit, about one-third thereof, which said part of said survey was actually enclosed as stated and was actually occupied, used and enjoyed as stated, by defendants and those under whom they claim, continuously and uninterruptedly for a period of more than thirty years before the filing of this suit; that what is spoken of in the charge as the Pistola Pasture, in which is situated those parts of said survey awarded by the charge to plaintiff, was actually enclosed by defendants, together with other lands, more than thirty years before the filing of this suit, by substantial fences around approximately five-sixth of the lands included in said pasture and by natural water barrier on the bay side of sufficient width and depth to prevent the ingress and egress of stock; that the side fences connecting with the water barrier on the bay side are extended out into the bay where the water is of sufficient depth to prevent the ingress and egress of

stock; that said enclosures of the Pistola Pasture was maintained by defendants and those under whom they claim continuously and uninterruptedly for a period of more than thirty years before the filing of this suit; that the said natural barrier on the bay side was so used in connection with said artificial barriers on the other three sides of the Pistola Pasture as to indicate that the same was relied on to enclose the land within the pasture and to keep out persons desiring access thereto; that the said enclosure was of such character as to meet the requirements of the statute as to adverse possession; that the said enclosures and the said improvements were of such character as to give notice to all others and to the world of the adverse possession of the defendants and those under whom they claim; that the adverse possession by the defendants, and those under whom they claim, of the land in controversy was actual and visible and of such character as to indicate clearly an assertion of claim of ownership in themselves; that the defendants and those under whom they claim had and held the peaceable and adverse possession required by the statute of the land awarded to plaintiff by the charge, cultivating, using and enjoying the same, and paying all taxes due thereon as the same accrued, under deeds duly registered, for the various periods of limitation, prior to the filing of this suit.

(g) The effect of the charge is to deprive the defendants of their property in said land without due process of law in violation of Section One of the 14th Amendment to the Constitution of the United States, in this. Under the undisputed facts that are conclusively established by the evidence and under the Statutes and Laws of the State of Texas, as construed and applied in such cases by the Courts of Last Resort of this State, regulating the acquisition of title to land in TEXAS by limitation, the defendants and those under whom they claim and whose title they have acquired and hold, under the three, five and ten years Statutes of Limitation of the State of Texas, a good and valid title to the land here in controversy situated in this State; and having so acquired title to said land, cannot be lawfully deprived of their title in said land by Judicial construction in conflict with said State Statutes and laws and settled line of decisions, which is the effect of said charge; and the charge is in conflict with said State Statutes and Laws and settled line of decisions and has the effect to deprive the defendants of their said property in said land, without due process of law in violation of the said provision of the Constitution.

The court erred in that part of its main charge to the jury, which reads as follows:

"In this case the court reaches the conclusion, and you are advised that by reason of the Special Act of the Legislature passed July 22, 1870, being an Act for the relief of the heirs of General Sam Houston, and in pursuance of the location and survey of the land

in question and patent by the Governor of the State of Texas to the heirs of General Sam Houston, and to their heirs and assigns, that the legal title to the 1280 acres of land in question is in the plaintiff in this case, and the plaintiff is entitled to recover all of said 1280 acres of land, less such parts thereof, as may have been acquired by one or more of the defendants by reason of the Statutes of Limitation."

Because the undisputed evidence in this case shows legal title to the 1280 acres of land involved in this case to have been vested in the defendants.

Assignment of Error No. Twenty-five.

The court erred in that portion of its main charge to the jury which reads as follows:

"I will say to you that the attitude of the court in disposing of the case is directed and controlled by a case decided by the Circuit Court of Appeals of this Circuit, in October, 1905, and reported in 140 Federal Reporter, the style of the case being Hyde vs. McFadden. The land in litigation in that case—it being a case of trespass to try title—is situated near Beaumont in Jefferson County, Texas. The case was reversed and rendered—that was the effect of the holding of the Circuit Court of Appeals. — In that case there was about seven miles of water front. In this case there is a water front of fourteen miles, and the court of Appeals for this Circuit, by whose judgment I am guided and controlled, in the discharge of
239 my duty. The water front is held by that court not to be such a barrier as would put in motion the Statutes of Limitation. Therefore, the plaintiff in this case should recover such part of the Houston Survey, which has not been defeated by adverse possession under the Statutes of Limitation of our State. It follows that the land, perhaps about one-third thereof, heretofore described as being in the 'Cruz Pasture' having no water front as a barrier, but being entirely enclosed for the requisite length of time under the Statutes of Limitation, should be awarded to the several defendants claiming the same. The balance of the survey, not having been enclosed, according to the testimony offered by the defendants, to-wit: Mr. Tumlinson, until April, 1905,—this suit being filed in May, 1914,—the defendants are not entitled to recover under their pleas of adverse possession, the land claimed by the defendants and situated in what is known as the 'Pistola Pasture,' should be awarded to the plaintiff, the Houston Pasture Company, by reason of the failure of the defendants to make good their pleas, except that part of the said survey claimed by the defendant, Gibson, amounting to 280.12 acres, and that part of said survey claimed by defendant, the Coleman-Fulton Pasture Company, having the form of a triangle and containing 153.64 acres. Under the evidence it appears that that particular tract of land was enclosed under a separate fence, erected in the year 1903, and that said defendant has been in possession thereof sufficiently long to acquire title against plaintiff."

Because the undisputed evidence in this case shows that the use and possession by the defendants in this case and those under whom they claim, of the land in controversy was such as gave the defendant in possession title to all of the said land by limitation.

240

Assignment of Error No. Twenty-six.

The court erred in that portion of its main charge to the jury which reads as follows:

"I will say to you that the attitude of the court in disposing of the case is directed and controlled by a case decided by the Circuit Court of Appeals of this Circuit, in October, 1905, and reported in 140 Federal Reporter, the style of the case being Hyde vs. McFadden. The land in litigation in that case—it being a case of trespass to try title—is situated near Beaumont in Jefferson County, Texas. The case was reversed and rendered—that was the effect of the holding of the Circuit Court of Appeals. In that case there was about seven miles of water front. In this case there is a water front of fourteen miles, and the Court of Appeals for this Circuit, by whose judgment I am guided and controlled, in the discharge of my duty. The water front is held by that court not to be such a barrier as would put in motion the Statutes of Limitation. Therefore, the plaintiff in this case should recover such part of the Houston Survey, which has not been defeated by adverse possession under the Statutes of Limitation of our State. It follows that the land, perhaps about one-third thereof, heretofore described as being in the 'Cruz Pasture' having no water front as a barrier, but being entirely enclosed for the requisite length of time under the Statutes of Limitation, should be awarded to the several defendants claiming the same. The balance of the survey, not having been enclosed, according to the testimony offered by the defendants, to-wit, Mr. Tumlinson, until April, 1905,—this suit being filed in May, 1914,—the defendants are not entitled to recover under their pleas of adverse possession, the land claimed by the defendants and situated in what is known as the 'Pistola Pasture,' should be awarded to the plaintiff, the Houston Pasture Company, by reason of the failure of the defendants to make good their pleas, except that part of said survey claimed by the defendant, Gibson, amounting to 280.12 acres, and that part of said survey claimed by defendant, the Coleman-Fulton Pasture Company, having the form of a triangle and containing 153.64 acres. Under the evidence it appears that that particular tract of land was enclosed under a separate fence, erected in the year 1903, and that said defendant has been in possession thereof sufficiently long to acquire title against plaintiff."

Because the evidence in this case was such as to entitle the defendants to have submitted to the jury the question as to whether or not the use and possession by them and those under whom they claim of the land in question was such as gave title to defendants in possession to all of said land by limitation.

Assignment of Error No. Twenty-seven.

The Court erred in all that portion of its main charge to the jury which reads as follows:

"In this case the court reaches the conclusion, and you are advised that by reason of the Special Act of the Legislature passed July 22, 1870, being an 'Act for the relief of the heirs of General Sam Houston,' and in pursuance of the location and survey of the land in question and patent by the Governor of the State of Texas to the heirs of General Sam Houston, and to their heirs and assigns, that the legal title to the 1280 acres of land in question is in the plaintiff in this case, and the plaintiff is entitled to recover all of said 1280 acres, less such parts thereof, as may have been acquired by one or more of the defendants by reason of the Statute of Limitations."

Because the effect of the charge is to deprive the defendants of their property in the land in controversy without due process of law, in violation of Section One of the Fourteenth Amendment to the Constitution of the United States in this. The plaintiff claims title to the land in controversy under conveyances from some of the heirs of Sam Houston, whose claim of title is based solely
242 on the Act of July, 1870; and the court, by instructing a verdict for plaintiff on said issue, holds that the Legislature, by said Act, intended to divert (and diverted) out of the estate of Sam Houston the right and title to the bounty warrant upon which the land in controversy was afterwards patented, and to vest (and vested) same in the heirs of said Houston, and intended to donate (and donated) to the said heirs the right and title to said bounty warrant and to the land afterward located and patented under and by virtue thereof, the same being the land in controversy. Such holding is in conflict with the laws of the State of Texas and the settled line of decisions of the Court of Last Resort of this State and has the effect to impair and destroy the defendants' defense that plaintiff can recover (if at all) only on proving title in himself, which rule of law is settled law in Texas, and constitutes and is a vested right of property; and such holding is further in conflict with said State laws and settled line of decisions in that the undisputed evidence establishes that right and title to the said bounty warrant and to the land located and patented under and by virtue thereof, was vested in the estate of Sam Houston and that these defendants have acquired and hold the said right and title to said bounty warrant and land; and the said instruction and holding of the court, that these defendants are not entitled to assert and maintain their said right and title so acquired, is in conflict with the laws and settled line of decisions of this State and have the effect to deprive the defendants of their property in said land, without due process of law, in violation of the said provisions of the Constitution, as fully appears by defendants' bill of exceptions to the action of the court.

Assignment of Error No. Twenty-eight.

The court erred in that portion of its main charge to the jury which reads as follows:

“I will say to you that the attitude of the court in disposing of the case is directed and controlled by a case decided by the Circuit Court of Appeals of this Circuit, in 243 October, 1905, and reported in 140 Federal Reporter, the style of the case being *Hyde vs. McFadden*. The land in litigation in that case—it being a case of trespass to try title—is situated near Beaumont in Jefferson County, Texas. The case was reversed and rendered—that was the effect of the holding of the Circuit Court of Appeals. In that case there was about seven miles of water front. In this case there is a water front of fourteen miles, and the Court of Appeals for this Circuit, by whose judgment I am guided and controlled, in the discharge of my duty. The water front is held by that Court not to be such a barrier as would put in motion the Statutes of Limitations. Therefore the plaintiff in this case should recover such part of the Houston Survey, which has not been defeated by adverse possession under the Statutes of Limitation of our State. It follows that the land, perhaps about one-third thereof, heretofore described as being in the ‘Cruz Pasture’ having no water front as a barrier, but being entirely enclosed for the requisite length of time under the Statutes of Limitation, should be awarded to the several defendants claiming the same. The balance of the survey, not having been enclosed, according to the testimony offered by the defendants, to-wit: Mr. Tumlinson, until April, 1905,—this suit being filed May, 1914,—the defendants are not entitled to recover under their pleas of adverse possession, the land claimed by the defendants and situated in what is known as the ‘Pistola Pasture’ should be awarded to the plaintiff, the Houston Pasture Company, by reason of the failure of the defendants to make good their pleas, except that part of said survey claimed by defendant, Gibson, amounting to 280.12 acres, and that part of said survey claimed by defendant, the Coleman-Fulton Pasture Company, having the form of a triangle and containing 153.64 acres. Under the evi- 244 dence it appears that that particular tract of land was enclosed under a separate fence, erected in the year 1903, and that said defendant has been in possession thereof sufficiently long to acquire title against plaintiff.”

Because the effect of the charge is to deprive the defendants of their property in said land without due process of law in violation of Section One of the 14th Amendment to the Constitution of the United States, in this. Under the undisputed facts that are conclusively established by the evidence and under the Statutes and Laws of the State of Texas, as construed and applied in such cases by the Court of Last Resort of this State, regulating the accumulation and acquisition of title to land in Texas by limitation, the defendants and those under whom they claim and whose title they have acquired and hold, under the three, five and ten year Statutes

of Limitation of the State of Texas, a good and valid title to the land here in controversy situated in this State; and, having so acquired title to said land, cannot be lawfully deprived of their title in said land by Judicial construction in conflict with said State Statutes and laws and settled line of decisions, which is the effect of said charge; and the charge is in conflict with said State Statute and Laws and settled line of decisions and has the effect to deprive the defendants of their said property in said land, without due process of law and in violation of the said provisions of the Constitution.

The defendants Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton, and W. F. Traxler, in addition to the errors hereinabove set out, file the following assignments of error as grounds for the reversal of the judgment of the District Court rendered in this case, to-wit:

Assignment of Error No. Twenty-nine.

The court erred in instructing the jury to find for the defendants, Frank L. Widergren, John A. Anderson and T. N. Pullen
245 against their warrantors, and in favor of each of said warrantors against his preceeding warrantor and in entering judgment on said verdict in favor of said Frank L. Widergren, John A. Anderson and T. N. Pullen against their warrantors and in favor of each of said warrantors against each of his preceeding warrantors, because the undisputed evidence in this case shows that the title of the defendants, Frank L. Widergren, John A. Anderson and T. N. Pullen was good and superior to that of plaintiff and that the right of said Frank L. Widergren, John A. Anderson and T. N. Pullen to recover against their warrantors and of each warrantor over against his preceeding warrantors was conditioned upon it being established that the plaintiff's title was superior to that of the defendants, Frank L. Widergren, John A. Anderson and T. N. Pullen.

Assignment of Error No. Thirty.

The court erred in instructing the jury to find for the defendants, Frank L. Widergren, John A. Anderson and T. N. Pullen against their warrantors, and in favor of each of said warrantors against his preceeding warrantors and in entering judgment on said verdict in favor of said Frank L. Widergren, John A. Anderson and T. N. Pullen against their warrantors and in favor of each of said warrantors against each of his preceeding warrantors, because the right of the defendants, Frank L. Widergren, John A. Anderson and T. N. Pullen to recover against their warrantors and of each warrantor to recover over and against his preceeding warrantor was conditioned upon it being established that the title of plaintiff was superior to that of the defendants, Frank L. Widergren, John A. Anderson and T. N. Pullen, and upon this issue the evidence was

such that it was the duty of the court to have submitted to the
 Jury for their determination the question as to whether the
 246 title asserted by plaintiff was superior to that of the defend-
 ants, Frank L. Widergren, John A. Anderson and T. N.
 Pullen.

JAS. B. WELLS,
 KLEBERG & STAYTON,
 J. C. HOUTS,
 SUTTLE & TODD,
 TEMPLETON, BROOKS, NAPIER &
 OGDEN,
Attorneys of Record for Defendants.

Indorsements: No. D. L.-8 At Law. In the District Court of the
 United States for the Southern District of Texas, Corpus Christi
 Division. Houston Pasture Company v. Alice State Bank, et al.
 Assignment of Errors. Filed July 23, 1915. L. C. Masterson,
 Clerk.

Petition for Writ of Error.

Filed July 23, 1915.

In the District Court of the United States for the Southern District
 of Texas, Corpus Christi Division.

No. D. L. 8. At Law.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of
 Appeals for the Fifth Circuit:

Now come the Alice State Bank, Coleman-Fulton Pasture Com-
 pany, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton, W. F.
 Traxler, Frank L. Widergren and John A. Anderson and
 247 T. N. Pullen, and would respectfully show that on the 24 day
 of May, A. D. 1915, this court entered judgment herein in
 favor of the plaintiff, Houston Pasture Company against Frank L.
 Widergren, John A. Anderson, T. N. Pullen and Alice State Bank for
 the title to three certain tracts of land described in said judgment,
 and further rendered in favor of said T. N. Pullen, Frank L.
 Widergren and John A. Anderson against the defendants, Coleman-
 Fulton Pasture Company, E. Cubage, J. C. Daugherty, J. W. Cook,
 S. J. Tipton and W. F. Traxler, as their warrantors, certain money
 judgments representing the liability of said defendants on their
 several warranties covering the property recovered by plaintiff,

Houston Pasture Company, from the defendants, T. N. Pullen, Frank L. Widergren and John A. Anderson in which said judgments each of said defendant warrantors recovered money judgments over against their preceding warrantors, and in which said judgments and the proceedings had prior thereto certain errors were committed to the prejudice of these defendants, all of which more in detail appear from the assignments of error which are filed with this petition.

Wherefore, these defendants pray that a writ of error be issued in this behalf to the United States Circuit Court of Appeals for the Fifth Judicial District for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this case duly authenticated may be sent to the said Circuit Court of Appeals, and also that an order fixing the amount of security that these defendants shall give and furnish upon said writ of error be made.

Dated this the 23rd day of July, A. D. 1915.

JAS. B. WELLS,
KLEBERG & STAYTON,
SUTTLE & TODD,
DAUGHERTY & DAUGHERTY,
J. C. HOUTS,
TEMPLETON, BROOKS, NAPIER &
OGDEN,

Att'ys of Record for Defendants.

248 The petition for writ of error of the defendants, Alice State Bank, Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton, W. F. Traxler, Frank L. Widergren and John A. Anderson and T. N. Pullen, be and the same is hereby granted, this the 23rd day of July, A. D. 1915, and the supersedeas bond fixed at the sum of Four Thousand Dollars (\$4,000.00).

W. T. BURNS,
United States District Judge.

Indorsements: No. D. L. 8 At Law. In the District Court of the United States for the Southern District of Texas, Corpus Christi Division. Houston Pasture Company v. Alice State Bank, et al. Petition for Writ of Error. Filed July 23, 1915. L. C. Masterson, Clerk.

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Writ of Error.

Filed July 23, 1915.

In the District Court of the United States for the Southern District
of Texas, Corpus Christi Division.

No. D. L., 8. At Law.

HOUSTON PASTURE COMPANY

vs.

ALICE STATE BANK et al.

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable Judges of the
District Court of the United States for the Southern District of
Texas, Greeting:

Because in the record and proceedings, as also in the rendition of
the judgment of a plea which is in said District Court before you,
or some of you, between Houston Pasture Company, plaintiff, and
Alice State Bank, T. N. Pullen, Frank L. Widergren, John A.
Anderson, Coleman-Fulton Pasture Company, E. Cubage, J. C.
Daugherty, J. W. Cook, S. J. Tipton and W. F. Traxler and others,
defendants, being cause N. D. L. 8 upon the law docket of the
Corpus Christi Division of said Court, a manifest error hath hap-
pened, to the great damage of said defendants, as by the complaint
of the defendants, Alice State Bank, Coleman-Fulton Pasture Com-
pany, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton, W. F.
Traxler, Frank L. Widergren and John A. Anderson and T. N.
Pullen, appears. We, being willing that such error, if any hath

been, should be duly corrected, and full and speedy justice
250 done to the parties aforesaid in this behalf, do command you,
if judgment be therein given, that then under your seal,
distinctly and openly you send the record and proceedings afore-
said, with all things concerning the same, to the Justices of the
United States Circuit Court of Appeals for the Fifth Circuit, to-
gether with this writ, so that you have the same at New Orleans,
Louisiana, within thirty days from the date hereof, in the United
States Circuit Court of Appeals, to be then and there held, and the
record and proceedings aforesaid being inspected, the said Justices
of the said Circuit Court of Appeals may cause further to be done
therein to correct those errors, what of right according to the laws
and customs of the United States ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the
United States, this the 23rd day of July, in the year of our Lord,
one thousand, nine hundred and fifteen.

[SEAL.]

L. C. MASTERSON,
Clerk of the United States Court.

Allowed, this the 23rd day of July, A. D. 1915.

W. T. BURNS,
United States District Judge.

Indorsements: D. L. No. 8. Houston Pasture Co. vs. Alice State Bank, et al. Writ of Error. Issued July 23rd, 1915. L. C. Masterson, Clerk. Filed July 23, 1915. L. C. Masterson, Clerk.

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Supersedeas Bond.

Filed July 23, 1915.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division

No. D. L., 8. At Law.

HOUSTON PASTURE COMPANY

VS.

ALICE STATE BANK et als.

Know all men by these presents: That we, Alice State Bank, a corporation, Coleman-Fulton Pasture Company, a corporation, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton, W. F. Traxler, Frank L. Widergren and Jno. A. Anderson and T. N. Pullen, as principals, and ———, and United States Fidelity & Guaranty Company, as sureties, are held and firmly bound unto the Houston Pasture Company, a corporation, plaintiff, in the full sum of Four Thousand Dollars (\$4,000.00) to be paid to the said Houston Pasture Company, its certain attorneys, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our successors, assigns, heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 22nd day of July, in the year of our Lord, one thousand nine hundred and fifteen.

Whereas, lately at a regular term of the District Court of the United States for the Southern District of Texas, at Corpus Christi, Texas, in a suit pending in said court between Houston Pasture Company, as plaintiff, and Alice State Bank, a corporation, and Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty,

J. W. Cook, S. J. Tipton, W. F. Traxler, T. N. Pullen, Frank L. Widergren and John A. Anderson, et als., as defendants,

252 No. D. L. 8, on the Law Docket of said court, a final judgment was rendered against the defendants, Alice State Bank, T. N. Pullen, Frank L. Widergren, and John A. Anderson in favor of the plaintiff for three certain tracts of land fully described in said judgment and in which said judgment the said defendants, T. N. Pullen, Frank L. Widergren and John A. Anderson, in turn recovered judgment against the defendants, Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton,

and W. F. Traxler, as their warrantors certain money judgments representing the liability of said defendants on their several warranties covering the property recovered by plaintiff, Houston Pasture Company, from the defendants, T. N. Pullen, Frank L. Widergren, and John A. Anderson, and in which said judgments each of said defendant warrantors recovered a money judgment over and against their preceding warrantors, that portion of said judgment affecting the rights of the parties hereto reads in words and figures substantially as follows, to-wit:

On this the 24th day of May, A. D. 1915, at regular term of this court, came on to be heard the above numbered and entitled cause, and then came the plaintiff by its attorneys and announced ready for trial, and then came defendant, Alice State Bank, by its attorneys, the defendants, W. E. Schmalsteig, W. J. Gibson, T. N. Pullen, John A. Harrell, A. A. Harrell, Frank L. Widergren and John A. Anderson, and Alfred Sivers, by and through their attorneys, D. W. Martin by and through his attorneys, and Coleman-Fulton Pasture Company by and through its attorneys, and announced ready for trial; and the defendants, Mr. Spessard, Wm. Truax duly cited to appear and answer herein, having filed an answer herein, failed to appear; and then came the following defendants, impleaded herein as warrantors, to-wit: Coleman-253 Fulton Pasture Company, J. D. Cook, A. A. Harrel, Detlef Hebbel, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton, and W. F. Traxler, by and through their attorneys, and announced ready for trial; and the defendants, J. P. McDowell, Martha H. McDowell and H. McDowell and C. L. Vickers, although duly cited failed to appear and answer herein. And the defendants, W. L. Dusenberry, M. T. Yates, George Brown, E. O. Sanders, C. A. Darnell, Catherine Darnell, — Sutton, Chas. G. Nelson and all other defendants if any not herein mentioned, came not and upon motion dully made in open court by their respective impleaders it is ordered said defendants so failing to answer herein and each of them are hereby dismissed from this cause of action and it is ordered that their respective impleaders pay the costs in this behalf expended, for which let execution issue. And then came a jury of twelve good and lawful men, to-wit: J. A. Hill, foreman, and eleven others, who, being duly impaneled and sworn, and after hearing the pleadings and the evidence under the direction of the Court, return into open court the following verdict, to-wit:

"We, the jury find for the plaintiff against the Alice State Bank for the 160 acres described in its answer and against Frank L. Widergren and John A. Anderson for the 160 acres described in their joint answer, and against T. N. Pullen for the 166-8/100 acres described in his answer, and we find in favor of plaintiff against said Widergren and Anderson for rent of said land the sum of \$315,—and in their favor against the plaintiff for improvements in the sum of \$2,235. And we find in favor of plaintiff against said Pullen for rent the sum of \$400, and in his favor against plaintiff for improvements in the sum of \$2,900. We also find against plaintiff in favor of all other defendants as to all the land in con-

troversy, other than that recovered by plaintiff above mentioned.

254 "And we find in favor of the defendants Widergren & Anderson and Pullen against their warrantors and in favor of each of said warrantors against each of his preceding warrantors for the amounts agreed upon.

J. A. HILL, *Foreman.*"

It is therefore ordered, adjudged and decreed by the Court that the plaintiff, Houston Pasture Company, do have and recover of and from the defendants the following described property, to-wit:

N. E. $\frac{1}{4}$ of Section No. 41, of the George H. Paul Subdivision of the Coleman-Fulton Pasture Company lands south of Taft, according to a plat duly recorded in the Plat Records of San Patricio County, Texas, for which it may have its writ of possession.

And it appearing to the court that all of the defendants, except the Alice State Bank, have filed a disclaimer to the aforesaid land, it is ordered that plaintiff recover against defendant, Alice State Bank, only, its costs in this behalf incurred, for which let execution issue.

That the plaintiff, Houston Pasture Company, do have and recover of and from the defendants the following described property, to-wit:

166.08 acres off of the East side of Section No. 56 of the George H. Paul Subdivision of the Coleman-Fulton Pasture Company lands south of Taft, according to a plat duly recorded in the Plat Records of San Patricio County, Texas, said 166.08 acres being all that portion of said Section 56 lying East of the land recovered herein by W. J. Gibson and South of the land recovered herein by Coleman-Fulton Pasture Company, for which it may have its writ of possession.

And it appearing to the court that all of the defendants, except T. N. Pullen, have filed a disclaimer to this land, it is ordered that plaintiff recover against defendant T. N. Pullen, only, its

255 costs in this behalf incurred, for which let execution issue. That the plaintiff, Houston Pasture Company, do have and recover of and from the defendants the following described property, to-wit: S. E. $\frac{1}{4}$ of Section No. 41, of the George H. Paul Subdivision of the Coleman-Fulton Pasture Company lands south of Taft, according to a plat duly recorded in the Plat Records of San Patricio County, Texas, for which it may have its writ of possession.

And it appearing to the court that all of the defendants, except Widergren and Anderson, have filed a disclaimer as to this land, it is ordered that plaintiff recover against defendants Frank L. Widergren and John A. Anderson only, its costs in this behalf incurred, for which let execution issue.

It is further ordered, adjudged and decreed by the court that the defendants, Frank L. Widergren and John A. Anderson, do have and recover of and from the plaintiff the sum of \$1290.00,

being the excess value of the improvements made in good faith upon the lands recovered by plaintiff from said defendants, over the estimated value of the use, occupation and damage to the land occupied by said Widergren and Anderson, and to which amount said land was actually increased thereby.

It is further ordered, adjudged and decreed by the court that the defendant, T. N. Pullen, do have and recover of and from his warrantors, to-wit: Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton and W. F. Traxler, the sum of \$11,984.02, with interest thereon from this date until paid at the rate of six per cent. per annum, and all costs in this behalf incurred, provided, however, that the liability of each of said defendants shall not exceed the amount hereinafter set out, and agreed upon between the said Pullen and his warrantors, as follows, to-wit:

Coleman-Fulton Pasture Company, \$5,115.26; E. Cubage, 256 \$7,068.39; S. J. Tipton, \$4,500.41; J. D Cook and W. F. Traxler, \$11,984.02; J. C. Daugherty, \$8,370.43.

It is further ordered, adjudged and decreed by the court that the defendants J. W. Cook and W. F. Traxler do have and recover of and from the defendants Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty, S. J. Tipton and W. F. Traxler, the sum of \$8,370.43, with interest thereon from this date until paid at the rate of six per cent. per annum, and all costs in this behalf incurred, provided, however, that the liability of each of said defendants shall not exceed the amount hereinafter set out and agreed upon between the warrantors, as follows, to-wit: Coleman-Fulton Pasture Company, \$5,115.26; E. Cubage, \$7,068.39; J. C. Daugherty, \$8,370.43; S. J. Tipton, \$4,500.41.

It is further ordered, adjudged and decreed by the court that the defendant S. J. Tipton do have and recover of and from the defendants Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty, J. W. Cook and W. F. Traxler, the sum of \$4,500.41, with interest thereon from date until paid at the rate of six per cent. per annum, and all costs in this behalf incurred, provided, however, that the liability of each of said defendants shall not exceed the amount hereinafter set out and agreed upon between the warrantors, as follows, to-wit: Coleman-Fulton Pasture Company, \$5,115.26; E. Cubage, \$7,068.37; J. C. Daugherty, \$8,370.43; J. W. Cook and W. F. Traxler, \$11,984.02;

It is further ordered, adjudged and decreed by the court that the defendant J. C. Daugherty, do have and recover of and from the defendants E. Cubage and Coleman-Fulton Pasture Company the sum of \$8,370.43, with interest thereon from date until paid at the rate of six per cent. per annum, and all costs in this behalf incurred, provided, however, that the liability of each of said defendants shall not exceed the amount hereinafter set out and 257 agreed upon between the warrantors, to-wit: E. Cubage, \$7,068.39; Coleman-Fulton Pasture Company, \$5,115.26;

It is further ordered, adjudged and decreed by the court that the defendant E. Cubage do have and recover of and from the de-

defendant Coleman-Fulton Pasture Company the sum of \$5,115.28, with interest thereon from date until paid at the rate of six per cent. per annum, as agreed upon between the warrantors, and all costs in this behalf incurred.

It is further ordered, adjudged and decreed by the court that the defendants, Frank L. Widergren and John A. Anderson shall have and recover from defendant Coleman-Fulton Pasture Company the sum of \$4480.00 with interest thereon from date until paid at the rate of six per cent. per annum, as agreed upon between the warrantors, and all costs in this behalf incurred.

It is further ordered, adjudged and decreed by the court that if any part of the amounts hereinbefore mentioned, which represents the purchase price set out in the several deeds, is at this time represented by outstanding and unpaid notes, that said notes may be cancelled and surrendered and in such case shall be accepted in part payment of the liability against any of such defendants.

It is further ordered, adjudged and decreed by the court that the several amounts hereinabove stated represent the liability of the several defendants upon their warranties, and that execution shall not issue in favor of any of the foregoing parties except the defendant T. N. Pullen, and defendants Frank L. Widergren and John A. Anderson, until such other defendants desiring execution shall first have paid the amount hereinabove adjudged against him.

It is further ordered, adjudged and decreed by the court that execution may issue in favor of the officers of the court against each of the parties hereto for all of the costs by them respectively incurred.

258 To which judgment the defendants, T. N. Pullen, Alice State Bank, Frank L. Widergren, John A. Anderson, Coleman-Fulton Pasture Company, J. C. Daugherty, E. Cubage, J. W. Cook, S. J. Tipton, W. F. Traxler, in open court duly excepted, and upon their application it was ordered that they have ninety (90) days within which to prepare their appeal and file their bills of exceptions, and the said defendants, Alice State Bank, Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton, W. F. Traxler and T. N. Pullen, having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment rendered against them in the aforesaid suit, and a citation directed to the said Alice State Bank and its attorneys of record citing and admonishing them to be and appear at a regular session of the United States Circuit Court of Appeals to be holden at New Orleans, Louisiana, according to law within thirty days from the 23rd day of July, A. D., 1915.

Now the condition of the above obligation is such that if the said Alice State Bank, Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton, W. F. Traxler, Frank L. Widergren and John A. Anderson and T. N. Pullen, shall prosecute their said writ of error with effect and answer all

damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

Principals:

J. C. DOUGHERTY,
COLEMAN-FULTON PASTURE COMPANY,
By TEMPLETON, BROOKS, NAPIER & OGDEN, *Att'ys.*
ALICE STATE BANK,
By JAS. B. WELLS, *Att'y.*
T. N. PULLIN,
FRANK L. WIDERGREN AND
JOHN A. ANDERSON,
By J. C. HOUTS, *Att'y.*
E. CUBAGE,
By KLEBURG & STAYTON, *Att'ys.*
J. W. COOK,
S. J. TIPTON, &
W. F. TRAXLER,
By SUTTLE & TODD, *Att'ys.*

Surety:

[SEAL.] UNITED STATES FIDELITY & GUARANTY
COMPANY,
By JOHN F. SCOTT, *Its Attorney in Fact.*

Approved, this the 23rd day of July A. D. 1915.

W. T. BURNS,
United States District Judge.

Indorsements: D. L. 8. Houston Pasture Co. vs. Alice State Bank, et al. Supersedeas Bond. Filed July 23, 1915. L. C. Masterson, Clerk.

280 Citation on Writ of Error and Acceptance of Service Thereon.

Filed July 23, 1915.

THE UNITED STATES OF AMERICA,
Fifth Judicial Circuit:

The President of the United States to Houston Pasture Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals, for the Fifth Circuit, according to law, within thirty days from the date hereof, pursuant to writ of error sued out and filed in the Clerk's office of the District Court of the United States for the Southern District of Texas, in the cause wherein Alice State Bank, Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton, W. F. Traxler and

T. N. Pullen are plaintiffs in error, and Houston Pasture Company is defendant in error, to show cause, if any there be, why the judgment rendered against the said Alice State Bank, Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton, W. F. Traxler, T. N. Pullen, Frank L. Widergren and John A. Anderson, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 23rd day of July, A. D. 1915, and of the independence of the United States the 140th year.

W. T. BURNS,
United States Judge.

We hereby accept service of the above and foregoing citation in error, this the 23 day of July, A. D. 1915.

W. D. GORDON,
Att'y for Ho. Pasture Co.

Indorsements: No. D. L. 8. At Law. Houston Pasture Company vs. Citation, Alice State Bank et al. Marshal's Return. Filed July 23, 1915. L. C. Masterson, Clerk.

261

Order for Transcript of Record.

Filed July 23, 1915.

Order for Transcript of Record.

In the United States District Court for the Southern District of Texas, Corpus Christi Division.

No. D. L., 8. At Law.

HOUSTON PASTURE COMPANY
VS.
ALICE STATE BANK et al.

Now come the defendants, the Alice State Bank, Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton, W. F. Traxler, Frank L. Widergren and John A. Anderson and T. N. Pullen, and ask that the following papers be embodied in the transcript of record to be filed in the United States Circuit Court of Appeals, to-wit:

- (1) Plaintiff's First Amended Original Petition.
- (2) Original Answer of Alice State Bank.
- (3) Original Answer of defendants Widergren and Anderson.
- (4) Original Answer of defendant T. P. Pullen.
- (5) Original Answer of defendants J. W. Cook, S. J. Tipton and W. F. Traxler.

- (6) Original Answer of defendant J. C. Daugherty.
- (7) Original Answer of defendant E. Cubage.
- (8) First Amended Original Answer of defendant Coleman-Fulton Pasture Company.
- 262 (9) Original Answer of defendant Coleman-Fulton Pasture Company, as remote warrantor.
- (10) Plaintiff's First Supplemental Petition.
- (11) Coleman-Fulton Pasture Company's First Supplemental Answer.
- (12) T. N. Pullen et al. First Supplemental Answer.
- (13) E. Cubage, et al. First Supplemental Answer.
- (14) Coleman-Fulton Pasture Company's trial amendment.
- (15) Special Charge No. 1, requested by defendants.
- (16) Special Charge No. 2, requested by defendants.
- (17) Special Charge No. 3, requested by defendants.
- (18) Special Charge No. 4, requested by defendants.
- (19) Special Charge No. 5, requested by defendants.
- (20) Special Charge No. 6, requested by defendants.
- (21) Special Charge No. 7, requested by defendants.
- (22) Special Charge No. 8, requested by defendants.
- (23) Special Charge No. 9, requested by defendants.
- (24) Special Charge No. 10, requested by defendants.
- (25) Special Charge No. 11, requested by defendants.
- (26) Special Charge No. 12, requested by defendants.
- (27) Special Charge No. 13, requested by defendants.
- (28) Special Charge No. 14, requested by defendants.
- (29) Special Charge No. 15, requested by defendants.
- (30) Special Charge No. 16, requested by defendants.
- (31) Special Charge No. 17, requested by defendants.
- (32) Special Charge No. 18, requested by defendants.
- (33) Special Charge No. 19, requested by defendants.
- (34) Charge of the Court.
- (35) Defendants' Bills of Exception.
- (36) Verdict of the Jury.
- 263 (37) Judgment, exception and 90 days within which to file Bills of Exceptions.
- (38) Assignments of Error.
- (39) Petition for Writ of Error.
- (40) Writ of Error and Supersedeas Bond.
- (41) Citation in Error.
- (42) Writ of Error.
- (43) Order for Transcript.
- (44) Clerk's Certificate.

J. B. WELLS,
 KLEBERG & STAYTON,
 SUTTLE & TODD,
 DAUGHERTY & DAUGHERTY,
 J. C. HOUTS,
 TEMPLETON, BROOKS, NAPIER &
 OGDEN,

Attys. of Record for Defendants.

I, W. D. Gordon, Attorney of record for Houston Pasture Company, plaintiff in the above entitled and numbered cause, do hereby waive the issuance and service of notice of the order of the defendants as to what papers they desire embodied in the transcript of record to be filed in the United States Circuit Court of Appeals in this cause and the order in which they shall appear in said transcript.

W. D. GORDON,

Attorney of Record for Houston Pasture Company.

Indorsements: No. D. L. 8 At Law. In the District Court of the United States for the Southern District of Texas, Corpus Christi Division. Houston Pasture Company vs. Alice State Bank et al. Order for Transcript of Record. Filed July 23, 1915. L. C. Masterson, Clerk.

264

Clerk's Certificate.

UNITED STATES OF AMERICA,
Southern District of Texas:

I, L. C. Masterson, Clerk of the District Court of the United States for the Southern District of Texas, do hereby certify the foregoing two hundred and sixty-four (264) pages contain a true copy of the record, bill of exceptions, assignments of errors, and all proceedings in the cause called for in the Order for Transcript of Record filed July 23, 1915, lately pending at the Corpus Christi Division of said Court, numbered 8, on the law docket of said Court, entitled Houston Pasture Company vs. Alice State Bank et al., as the same now appears of record in my office, except that the Original Writ of Error and Citation in Error are included on pages 249, 250 and 260 herein instead of copies thereof.

To certify which, witness my hand and seal of said Court, at Houston, this 4th day of August, A. D. 1915.

[SEAL.]

L. C. MASTERSON,

Clerk U. S. District Court, Southern District of Texas.

265

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of November 3, 1915.

No. 2823.

ALICE STATE BANK et als.

versus

HOUSTON PASTURE COMPANY.

On this day this cause was called, and, after argument by Walter P. Napier, Esq., for plaintiffs in error, and W. D. Gordon, Esq., for defendant in error, was submitted to the Court.

Opinion of the Court.

Filed November 27th, 1915.

United States Circuit Court of Appeals, Fifth Circuit.

266

No. 2823.

ALICE STATE BANK et als.

v.

HOUSTON PASTURE COMPANY.

Error to the United States District Court for the Southern District of Texas.

Before Pardee and Walker, Circuit Judges, and Speer, District Judge.

By the Court: On the evidence shown in the transcript the legal title to the land in controversy is in the Houston Pasture Company. The plaintiffs in error show no sufficient title by limitation. See Hyde v. McFaddin, 140 F. 433.

We conclude from the evidence that the Judge below properly directed a verdict for defendant in error.

Affirmed.

Judgment.

Extract from the Minutes of November 27, 1915.

267

No. 2823.

ALICE STATE BANK et als.

versus

HOUSTON PASTURE COMPANY.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiffs in error, Alice State Bank, Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton, W. F. Traxler, Frank L. Widergren, and John A. Anderson and T. N. Pullen, and the surety on the writ of error bond herein, United States Fidelity & Guaranty Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

268

Petition for Rehearing.

Filed December 13, 1915.

United States Circuit Court of Appeals for the Fifth Circuit.

No. 2823. Law.

ALICE STATE BANK et al., Plaintiffs in Error,
VERSUS
HOUSTON PASTURE COMPANY, Defendant in Error.

From the United States District Court for the Southern District
of Texas, Corpus Christi Division.

Petition for Rehearing.

Now come the plaintiffs in error, Alice State Bank, Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton, W. F. Traxler, Frank L. Widergreen, John A. Anderson, and T. N. Pullen, and respectfully petition this Honorable Court to set aside the judgment of the court heretofore rendered and to grant a rehearing, and to reverse the judgment of the court below, for the following reasons, to-wit:

First.

The assignments of error attacking the action of the trial judge in directing a verdict against plaintiffs in error upon the issue of the five years statute of limitation, and in refusing to submit this issue to the jury, as set out in special charges requested by plaintiffs in error, should have been sustained, and this court erred in holding, as a matter of law, that plaintiffs in error showed no sufficient title by limitation, in this:

The following facts were conclusively proven upon the trial of this case and were undisputed, as appears from the transcript of record herein, to-wit:

(a) That the plaintiffs in error, and those under whom they claim, are, and have been since 1879, claiming title under a deed duly executed, acknowledged, and recorded in the deed records of San Patricio County, Texas, the county in which said property was situated, all as required by law, and in which said deed the boundaries of the land claimed are clearly defined. (Trans., p. 116).

(b) That plaintiffs in error, and those under whom they claim, have paid taxes on the property in question each and every year since 1872, in the manner required by law. (Trans., pp. 143-145, 182 and 184).

(c) That about one-third of the Sam Houston survey of 1,280

acres is enclosed in what is known as the Cruz Pasture, which pasture was at the time of the trial, and has been continuously since 1878, enclosed by a good and substantial fence, and since the time of its enclosure has been continuously to a few years ago used by plaintiffs in error, and those under whom they claim, for pasture purposes and now for farming. (Trans., pp. 116-117).

(d) The trial court found that the possession of that part of the Sam Houston survey enclosed within the Cruz Pasture (about 400 acres) was such as to defeat the defendants in error's alleged legal title, and so instructed the jury. (Trans., p. 81).

(e) That no one, other than plaintiffs in error, and those under whom they claim, has ever occupied or been in possession of any part of the land covered by the Sam Houston survey.

Plaintiffs in error plead the five years statutes of limitation in bar to the defendant in error's right to recover herein.

It is a settled rule of law in this State that actual possession of a tract by one who claims under a deed duly registered a larger tract, extends his possession to the boundaries described in his deed in the absence of actual adverse possession of any part of the tract by another.

Watkins v. Smith, 91 Tex., 592.

Taliferro v. Butler, 77 Tex., 578.

Parker v. Bain, 65 Tex., 605.

Evitts v. Ross, 61 Tex., 81.

Tex. Land Co. v. Williams, 51 Tex., 51.

Snow v. Letcher, 154 S. W., 355.

Davidson v. Equitable Security Co. 96 S. W., 787.

Coleman v. Flores, 61 S. W., 412.

Bogges et al. v. Allen, 56 S. W., 195.

This rule of law has been recognized and applied by this court as late as February 10, 1914, in the case of Houston Oil Company of Texas v. Goodridge, 213 Fed., 136, and by the Supreme Court of the United States in many cases, a number of which are reviewed by this court in the Houston Oil Company case just above mentioned.

In order to support the plea of five years' limitation it is not necessary that all of the land shall have been enclosed.

In disposing of the question of limitation, this court bases its opinion upon the authority of Hyde v. McFaddin, 140 Fed., 433. Occupancy of a part of a large tract under a deed describing the large tract and a claim of title to the entire tract under the five years' statute of limitation was not involved in that case.

The possession of plaintiffs in error, and those under whom they claim, of that part of the Sam Houston survey enclosed within the Cruz Pasture and consisting of about four hundred acres, extended their constructive possession to the boundaries of the deed under which they have been claiming since 1879, and, therefore, it was for the jury to say whether plaintiffs in error had established their

plea of the five years' statute of limitation, and the court below erred in directing a verdict against them and in favor of defendant in error.

Second.

The assignments of error attacking the action of the trial judge, in directing a verdict against plaintiffs in error upon the issue of the ten years' statute of limitation, and in refusing to submit this issue to the jury, as set out in special charges requested by plaintiffs in error, should have been sustained, and this court erred in holding, as a matter of law, that plaintiffs in error showed no sufficient title by limitation, in this:

The following facts were conclusively proven upon the trial of this case, and were undisputed, as appears from the transcript of record herein, to-wit:

(a) About one-third of the Houston survey of 1,280 acres was within the Cruz Pasture, and said pasture was at the time of the trial, and had been continuously since 1878, enclosed by a good and substantial fence. (Trans., p. 156).

273 (b) That the remainder of the Houston Survey was included within what is known as the Picatche Pasture, which pasture was entirely enclosed at the time of the trial, and had been since 1881, on the west, north and east by a good and substantial fence, and on the south by the waters of the Nueces Bay. The fencing on the east and west extends out into deep water of the Nueces Bay. (Trans., pp. 145, 150, 153, 157 and 161).

(c) That substantial improvements, such as a windmill, a tank, pens, and a house had been erected upon that part of the Houston Survey lying in the Picatche Pasture as early as 1872, and which were used for many years, and some of them down to the time of the trial. (Trans., p. 179).

(d) That as early as 1872 those under whom plaintiffs in error claim excluded all cattle, except their own, from their pasture, within which the land in controversy was included, and have exercised exclusive control over same since that time. (Trans., p. 179).

(e) That since 1872 down to a few years ago those under whom the plaintiffs in error claim, pastured many head of cattle, sometimes as high as forty thousand head, on the pastures in which the land in controversy is situated, and since then the land has been used for farming purposes. (Trans., p. 145).

(f) That no one, other than plaintiffs in error, and those under whom they claim, have ever been in possession of or occupied any part of the land in question.

(g) That the Nueces Bay, which served as a barrier on the south of the pasture within which a part of this survey was situated, is from three to five miles wide and from nine to twelve and a half feet deep, and cattle have never been known to cross same. (Trans., p. 174).

274 (h) That plaintiffs in error, and those under whom they claim, have paid taxes on the property in question each and

every year since 1872, in the manner required by law. (Trans., pp. 143, 145, 182 and 184).

(i) That the plaintiffs in error, and those under whom they claim, are, and have been since 1879, claiming title under a deed duly executed, acknowledged, and recorded in the deed records of San Patricio County, Texas, the county in which said property was situated, all as required by law, and in which said deed the boundaries of the land claimed are clearly defined. (Trans., p. 116).

Plaintiffs in error plead the ten years' statute of limitation in bar to defendant in error's right to recover herein.

In disposing of this issue the court cites the case of *Hyde v. McFaddin*, 140 Fed., 433. The facts in this case, we respectfully submit, are not similar to those in the case cited, but are similar to those in the cases of *Dun v. Taylor*, 102 Tex., 80; *Randolph v. Lewis*, 163 S. W., 649; *Loring v. Jackson*, 95 S. W., 19; *Alley v. Bailey*, 47 S. W., 821, wherein the courts of this State have held that an enclosure consisting partly of water barriers and partly of artificial barriers, is sufficient to establish adverse possession, when the natural boundaries are so used in connection with the artificial barriers so as to give notice that the natural barriers are relied upon to constitute a part of the enclosure.

In fact, this has become a rule of property right in this State without a single conflicting decision, and therefore in such cases the only issue to be tried is whether, taking into consideration the quantity, locality and character of the land, the artificial barriers with the natural ones were sufficient to notify the public that the land was appropriated and to make such appropriation an indication of ownership, and this it is the province of the jury to determine.

275 The contention of plaintiffs in error in this case is, not that the trial court should have instructed a verdict in their favor upon this issue, but that the issue of adverse possession in this case, as our courts have held in every case in this State in which there has been any evidence whatsoever of adverse possession, should be submitted to the jury. This issue is one of fact and plaintiffs in error earnestly submit that the determination of same should have been left to the jury.

Third.

The assignment of error attacking the action of the trial judge in holding that the legal title to the land in controversy was in defendant in error, should have been sustained and this court erred in holding that the legal title to the land in controversy was in the Houston Pasture Company, in this:

On June 20, 1838, the Republic of Texas, for services rendered in the army, issued to General Sam Houston Bounty Warrant No. 3894, entitling him to 1,280 acres of land.

On July 22, 1870, the Legislature of the State of Texas passed an Act whereby said warrant was "approved and declared to be a just claim against the State of Texas, and that the Commissioner of

the General Land Office be and he is hereby authorized to issue a patent on same in the name of the heirs of General Sam Houston deceased."

On July 22, 1871, for a valuable consideration, the duly qualified executor of the estate of General Sam Houston, deceased, legally conveyed said Bounty Warrant No. 3894, which had become a part of the estate of General Sam Houston, deceased (*Todd v. Masterson*, 61 Tex., 621), to Coleman, Mathis & Fulton, under whom plaintiffs in error claim.

276 On December 30, 1872, said warrant was located in San Particio County, Texas, on the land in controversy.

On June 22, 1874, a patent to the land so located was issued by the State of Texas to the heirs of Sam Houston, deceased.

Plaintiffs in error understand, of course, that the legal title and not the equitable title is the issue involved. The fact that the patent issued by the State of Texas to the heirs of Sam Houston, deceased, did not vest the legal title in them, unless they were also the legal owners of the certificate which was the basis of the issuance of the patent.

It is a settled rule of law in this State that upon the issuance of a patent by the State of Texas, regardless of whom may be named as the grantee in said patent, the legal title to the land described in the patent is by estoppel immediately vested in the lawful owners of the certificate which was the basis for the issuance of the patent.

Allen v. Clark, 21 Tex., 405.

Adams v. House, 61 Tex., 641.

If the legal title to the Bounty Warrant No. 3894 was vested in those under whom plaintiffs in error claim at the time of the issuance of the patent, then the legal title to the land immediately upon the issuance of said patent became vested in the owners of the certificate. If, on the other hand, the heirs of Sam Houston were the owners of the certificate at the time of the issuance of the patent, then, of course, the legal title on the issuance of the patent was vested in them.

In order to establish ownership to the certificate in question, defendant in error relies upon the Act of July 22, 1870, and in order to hold that this Act vested the legal title to said bounty warrant in the heirs of Sam Houston said Act must be construed to be a donation.

277 This construction of the Act renders it null and void, as the Legislature at that time had no constitutional power to so dispose of the public lands. (Sec. 6, Art. 10, Constitution of 1870.)

To do so negatives the clear wording of the Act wherein said warrant was "approved and declared to be a just claim from its date against the State of Texas." An Act recognizing a pre-existing claim to land and an Act donating land certainly cannot be one and the same.

The first the Legislature had the authority to do (*Holmes v. Anderson*, 59 Tex., 483), the latter it did not (Art. 10, Sec. 6, Constitution, 1870).

The defendant in error admits that in order to sustain the contention that the Act of 1870 was a donation, the validating Act of March 31, 1883 (see page 81, plaintiffs in error's brief), must be relied upon. This Act did not either in express terms or by inference validate the Act of 1870 in question. This Act validates all surveys made and patents issued only by virtue of certificates issued under special laws enacted after March 31, 1870, and prior to April 11, 1876, insofar as their validity depended on want of power in the Legislature to pass same.

No certificate was ever issued to any one by virtue of the Special Act of 1870. In fact, the said Act of 1870 did not authorize the issuance of any such warrant. It only approved in express terms as being a valid claim from the date of its issuance, the land certificate that had been issued in 1838.

A careful consideration of the authorities cited and the provisions of the law and constitution of this State referred to fails to support the contention that the legal title to the land in controversy is in defendant in error.

Fourth.

278 To hold, as a matter of law, that plaintiffs in error have failed to establish sufficient title by limitation brings into question the title to thousands of acres of land in this State, and is contrary to a settled line of decisions that has become a rule of property right in this State.

Plaintiffs in error sought to prove, by the witness James B. Wells, that he was familiar with the extent to which the owners of land abutting upon the bays in the location of the land in question recognized and used the water fronts as barriers, and that they were invariably relied upon and recognized by the public generally as being sufficient barriers when used in connection with artificial barriers to constitute an enclosure and to give notice of adverse possession. (See plaintiffs in error's Bills of Exceptions Nos. 1, 2 and 3, Trans., pp. 180-181.) This testimony was clearly admissible under the decisions of this State.

Dunn v. Taylor, 102 Tex., 80.

The quantity, locality and character of the land are necessary matters to be considered in determining whether the particular uses to which a tract of land is put and the conditions under which it is used is sufficient to constitute adverse possession.

Dunn v. Taylor, 107 S. W., 952.

From the bills of exceptions it clearly appears what Judge Wells would have testified had the court permitted him. And if the jury had found that in the locality in which the land in question was situated it was the custom to rely upon the bay as a barrier in connection with fencing to enclose lands for pasture purposes, then under every decision of this State bearing upon the question plaintiffs in error would have been entitled to a verdict.

279 To hold, however, that this matter should not be submitted to a jury and to announce a fixed rule, defining adverse possession without regard to locality, use and character of the land, will, as above stated, result in rendering the title to many acres of land in Southwest Texas fronting upon the bays questionable.

Obedience to the rules of this court makes it impossible for us in this motion to give the questions involved the full consideration which we believe, because of their importance, not only to the plaintiffs in error in this case, but to property owners generally in Southwest Texas, they deserve, so that we feel it will not be improper for us to ask the judges of this Honorable Court to permit plaintiffs in error by their attorneys to appear at such time and place as may be convenient to the said judges and present an oral argument in behalf of this petition. We know of no question affecting the titles to lands in Texas which has been before this court that is as important as is the issue of limitation as involved in this case.

Plaintiffs in error represent that Mr. W. D. Gordon, who resides at Beaumont, Jefferson County, Texas, is the attorney of record for defendant in error.

Wherefore, plaintiffs in error pray that notice according to law be given of this petition and that on hearing hereof the judgment affirming this cause heretofore rendered herein be set aside and the judgment of the lower court reversed.

JAMES B. WELLS,
KLEBERG & STAYTON,
J. C. HOUTS,
SUTTLE & TODD,
DAUGHERTY & DAUGHERTY,
TEMPLETON, BROOKS, NAPIER &
OGDEN,

Attorneys for Plaintiffs in Error.

280 I, Walter P. Napier, attorney of record for plaintiffs in error, do hereby certify that the foregoing petition for rehearing is not interposed for the purpose of delay and that each of the reasons hereinabove stated as to why this petition for a rehearing should be allowed is in my opinion well founded.

Respectfully submitted,

(Signed)

WALTER P. NAPIER,

Attorney of Record for Plaintiffs in Error.

Order Denying Rehearing.

Extract from the Minutes of January 4, 1916.

No. 2823.

ALICE STATE BANK et als.,
versus
HOUSTON PASTURE COMPANY.

Ordered that the petition for rehearing filed in this cause, be, and the same is hereby, denied.

281

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 265 to 281 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2823, wherein Alice State Bank, et als. are plaintiffs in error, and Houston Pasture Company is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 264 are identical with the printed record upon
282 which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 28th day of February, A. D. 1916.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,

Clerk of the United States Circuit Court of Appeals.

283 In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2823.

ALICE STATE BANK et als., Plaintiffs in Error,
versus

HOUSTON PASTURE COMPANY, Defendant in Error.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari, I now hereby certify that on the 5th day of June, A. D. 1916, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:

Supreme Court of the United States, October Term, 1915.

No. 973.

ALICE STATE BANK et al., Petitioners,
versus
HOUSTON PASTURE COMPANY, Respondent.

284 It is hereby stipulated by and between the parties hereto that the certified transcript of the record in the above entitled action heretofore filed in the office of the Clerk of the Supreme Court upon a petition for a writ of certiorari issued by the Supreme Court on the 26th day of May, 1916, in the above entitled action, shall be taken and be deemed to be a sufficient return by the Clerk of the Circuit Court of Appeals of the United States in and for the Fifth Circuit to said writ of certiorari.

Dated, June 1st, 1916.

(Signed)

WALTER P. NAPIER,
HENRY W. TAFT,
Counsel for Petitioners.
W. D. GORDON,
THOS. J. BATEN,
H. M. HOLDEN,
W. H. BALDWIN,
Counsel for Respondents.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 5th day of June, A. D. 1916.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
*Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit.*

285 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Alice State Bank, Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton, W. F. Traxler, Frank L. Widergren, John A. Anderson, and T. N. Pullen, are plaintiffs in error, and Houston Pasture Company is defendant in error, No. 2823, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the

United States for the Southern District of Texas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-sixth day of May, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25256. Supreme Court of the United States, October Term, 1915. No. 973. Alice State Bank et al. vs. Houston Pasture Company. Writ of Certiorari.

287 [Endorsed:] 973—25256. No. 2823. United States Circuit Court of Appeals for the Fifth Circuit. Alice State Bank, et al., Petitioners, vs. Houston Pasture Company, Respondent. Return to Writ of Certiorari.

288 [Endorsed:] File No. 25256. Supreme Court U. S., October term, 1915. Term No. 973. Alice State Bank et al., Petitioners, vs. Houston Pasture Company. Writ of certiorari and return. Filed June 8, 1916.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1915.

No. _____

ALICE STATE BANK, *et als*, PETITIONERS,
versus
HOUSTON PASTURE COMPANY, RESPONDENT.

Petition for Certiorari.

To the Honorable Supreme Court of the United States:

Alice State Bank, a corporation and citizen of Texas, having its domicile and place of business in the City of Alice, Jim Wells County, Texas; John A. Anderson and Frank L. Widergren, resident citizens of Madison County, State of Nebraska; T. N. Pullin, a resident citizen of Karnes County, State of Texas; Coleman-Fulton Pasture Company, a corporation and citizen of the State of Texas, having its domicile and place of business in San Patricio County, Texas; E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton and W. S. Traxler, resident citizens of the State of Texas, hereinafter styled petitioners, complaining of the Houston Pasture Company, a corporation

and citizen of the State of Louisiana, with its domicile and place of business in Benton, Bossier Parish, Louisiana, hereinafter styled respondent, submit this, their application for writ of certiorari, to review a decision of the Honorable Circuit Court of Appeals for the Fifth Circuit entered on the 27th day of November, 1915, in Cause No. 2823 Law, styled Alice State Bank, et als, plaintiffs in error, v. Houston Pasture Company, defendant, in error, and file herewith as an exhibit to this petition certified copy of the entire transcript of record in this cause, including the proceedings in the Circuit Court of Appeals, and also file herewith necessary printed copies of said record and brief in support of this motion, and make, as required by the rules, the following

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED AND THE GENERAL REASONS RELIED UPON FOR WRIT OF CERTIORARI.

I.

Respondent and petitioners are citizens and residents of the different States and jurisdiction of the United States District Court for the Southern District of Texas (the trial court) attached in this suit by reason thereof *only*, and the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, to which petitioner prosecuted writ of error to reverse a judgment of the trial court in favor of respondent, is, therefore, final.

II.

This suit, an action at law, was begun by respondent against petitioners and others in trespass to try title and for damages, under the Texas Statute, to recover title and

possession of, and for damages in the sum of \$5,000.00 by reason of having been deprived of the use of 1280 acres of land known as the Sam Houston Survey in San Patricio County, Texas, patented by the State of Texas to the heirs of General Sam Houston, deceased. Petitioners pleaded "Not guilty" which put in issue the title of the parties. They also pleaded the Texas Statutes of Limitations of three, five and ten years. The trial was with a jury in May, 1915, with judgment in accordance with the instructions of the court in favor of respondent for 486.88 acres of the 1280 acres involved.

III.

The land recovered by respondent was situated in a pasture enclosed on three sides by good and substantial fencing and on the fourth by the waters of the Nueces Bay an arm of the Gulf of Mexico. Petitioners and those under whom they claim have been in possession of said land and the enclosure above mentioned has been maintained, for more than forty years. Without submitting the issue of limitation to the jury, the trial court held that a natural barrier such as the Nueces Bay, cannot be considered as a part of an enclosure in order to establish adverse possession.

IV.

Petitioners were thereby denied the right of trial by jury upon the issue of limitation, the trial court having refused to submit such issue to the jury and holding that the evidence was not sufficient to require such issue to be submitted. Appropriate charges were requested, refused, exceptions reserved, and error assigned. The action of the trial court was affirmed by the Circuit Court of Appeals, Fifth Circuit, November 27, 1915, and the error of both courts is complained of here.

The trial court admitted evidence offered by petitioners upon the issue that:

In 1838, for military services rendered, the State of Texas issued to General Sam Houston a bounty land warrant for 1280 acres of land; in 1871 the duly qualified executor of the estate of Sam Houston, deceased, for a valuable consideration, duly conveyed said land certificate to Coleman, Mathis & Fulton, a partnership; in 1872 said certificate was located in San Patricio County, Texas, upon lands adjoining those of Coleman, Mathis & Fulton, and they immediately entered upon and took possession of said land as surveyed, and they and those claiming under them, by deeds duly executed and recorded in the proper records of San Patricio County, Texas, the county in which said land is located, have been in actual and continued possession of said lands from the date of said location to the date of the trial; that no one other than petitioners and those under whom they claim have ever been in possession of any part of said lands and that they have diligently each year, when and as they became due, paid all taxes assessed against said property; that Coleman, Mathis & Fulton, commenced to fence their pastures in which the lands in question were located, in 1872, and by 1881 the entire pasture was fenced; that said fencing was of a good and substantial nature and has been kept up and maintained from the date of its construction down to the date of the trial, and that up to about 1908 the said Coleman, Mathis & Fulton, and its successor, Coleman-Fulton Pasture Company, pastured thousands of head of cattle on these lands, often having as many as forty thousand head grazing at one time. That about 1908, Coleman-Fulton Pasture Company subdivided a portion of the lands including the 486.88 acres in question, and conveyed same by warranty deeds under which your petitioners claim. That the 486.88 acres recovered by respondent are a part of that portion of the Sam Houston Survey

situated in one of the pastures that was enclosed by your petitioners' predecessors in title upon three sides by good and substantial fencing and the waters of the Nueces Bay on the other. The east and west fences, which ran at right angles to the Nueces Bay, extended out into deep water in order to prevent passing, and were each above twelve miles in length. The fencing on the north was about seven miles in length, and the water frontage on the south was about six miles in length. No one but your petitioners and those under whom they claim were ever allowed to use said lands or were ever heard to assert title to any part thereof. Cross fences have been from time to time erected on said lands and valuable improvements made. Respondent admitted upon the trial that your petitioners bought said land in good faith and entered upon and made improvements in good faith thereon, believing that they had acquired good title thereto.

Respondent offered in evidence an act of the Legislature of the State of Texas of date of 1870, entitled "An Act for the relief of the heirs of General Sam Houston, deceased," which said act finds that said land certificate of 1838 issued to General Sam Houston, as aforesaid, to be a just and valid claim against the State of Texas, and to have been such since the date of its issuance. A patent from the State of Texas of date 1874 to the heirs of General Sam Houston, deceased, to the 1280 acres of land in San Patricio County, reciting that said land described therein had been patented by virtue of said original certificate issued to General Sam Houston in 1838. The trial court held that by reason of the special act of the Legislature of 1870 and the patent aforesaid the legal title to the land was vested in respondents and that as to the 486.88 acres involved, your petitioners had failed to establish title by limitation for the reason that the enclosure within which same were located was not such as would support adverse possession,

the waters of the Nueces Bay being relied upon as a part of said enclosure. It having been clearly shown that the remainder of the 1280 acres were situated within enclosures composed entirely of artificial barriers, title by limitation was sustained. The complaint of petitioners is that this evidence is sufficient under the laws and decisions of this State to make the question as to whether the enclosure consisting of substantial fencing on three sides and the waters of the Nueces Bay on the fourth such an enclosure as to establish adverse possession one for the jury, and it was error to deprive petitioners of the right of having said issue submitted to the jury.

V.

Your petitioners aver that the present case is one in which it is proper to issue a writ of certiorari for the reason that the Circuit Court of Appeals by its decision in affirming the judgment of the lower court has held as a matter of law that when an enclosure is relied upon to establish adverse possession in support of a title by limitation such enclosure cannot consist partly of natural and partly of artificial barriers, which holding is in direct conflict with the settled line of decisions of this State, to-wit:

Dunn vs. Taylor, 102 Tex., p. 80.

Frazer vs. Sereau, 128 S. W., 649.

Loring vs. Jackson, 95 S. W., 19.

Randolph vs. Lewis, 163 S. W., 649.

Alley vs. Bailey, 47 S. W., 821.

That there are thousands of acres of land in Texas the title to which is held by adverse possession supported by enclosures consisting partly of natural and partly of artificial barriers, which have uniformly been held sufficient by the courts of this State. Therefore, this question is of sufficient

general and material importance and intent as to make it necessary that it should be determined by the court of last resort.

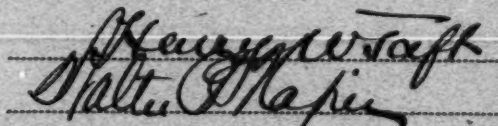
VI.

In the brief of petitioners filed herewith the issues and evidence supporting petitioners' claim are pointed out more fully than in this motion and said brief is referred to in aid hereof.

VII.

Respondent is represented by W. D. Gordon, Esquire, and T. J. Baten, Esquire, of Beaumont, Jefferson County, Texas, in the Eastern Judicial District of Texas; W. H. Baldwin, Esquire, of Rockport, Texas, and H. M. Holden of Corpus Christi, Texas, both in the Southern Judicial District of Texas, who have appeared as attorneys in the trial court and in the Circuit Court of Appeals.

Wherefore, petitioners pray that this petition for certiorari be granted, and that this court proceed as is required by law and the rules of the court in such case, and that upon final hearing the judgment of the trial court and the Circuit Court of Appeals be reversed, and the cause remanded with the proper instructions for a new trial.



Attorneys for Petitioners.

JAMES B. WELLS,
SUTTLE & TODD,
KLEBERG & STAYTON,
DAUGHERTY & DAUGHERTY,
J. C. HOUTS,
TEMPLETON, BROOKS, NAPIER & OGDEN,
of Counsel.

I, Walter P. Napier, of counsel for petitioners named in the foregoing petition, solemnly swear that I have read the foregoing petition and that the facts there in set out are true to the best of my knowledge, information and belief; my knowledge is derived from the record in this case and from what has taken place in my presence and hearing in the court in which this action has been heard.

Walter P. Napier

WALTER P. NAPIER.

Subscribed and sworn to before me, this the 27th day of March, A. D. 1916.

C. R. Keim

Notary Public, Bexar County, Texas.

I, Walter P. Napier, attorney and counselor at law, admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing petition for writ of certiorari; that the same is not made for the purpose of delay and that in my opinion said petition is meritorious and well founded in law and ought to be granted and the writ issued.

Walter P. Napier

WALTER P. NAPIER,
of Counsel for Petitioners.

No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1915.

ALICE STATE BANK, *et als.*, Petitioners,
versus
HOUSTON PASTURE COMPANY, Respondent.

Come now Alice State Bank, *et als.*, by Henry W. Taft and Walter P. Napier, of counsel, and move this Honorable Court that they shall by certiorari or other proper process to the Honorable, the Judges of the Circuit Court of Appeals for the Fifth Circuit, require said court to certify to this Honorable Court for its review and determination a certain cause in said Circuit Court of Appeals lately pending wherein your petitioners were appellants and Houston Pasture Company was appellee, Numbered 2823, Law, and to that end they now tender herewith their petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

Henry W. Taft
Walter P. Napier

Attorneys for Petitioners.

JAMES B. WELLS,
SUTTLE & TODD,
KLEBERG & STAYTON,
DAUGHERTY & DAUGHERTY,
J. C. HOUTS,
TEMPLETON, BROOKS, NAPIER & OGDEN,
of Counsel.

No.....

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1915.

ALICE STATE BANK, *et als.*, Petitioners,
versus
HOUSTON PASTURE COMPANY, Respondent.

To W. D. Gordon, T. J. Baten, W. H. Baldwin and H. M.
Holden, attorneys for respondent, Houston Pasture
Company:

Sirs:

You are hereby notified that Alice State Bank, *et als.*,
plaintiffs in error in Cause No. 2823, Law, styled Alice State
Bank, *et als.*, plaintiffs in error, versus Houston Pasture
Company, defendant in error, in the United States Circuit
Court of Appeals, Fifth Circuit, will on Monday the 8th
day of May A. D. 1916, upon their verified petition and a
copy of the entire record in this cause, at the opening of the
court on that day, or as soon thereafter as counsel can be
heard, submit a motion, a copy of which and of the petition
for writ of certiorari and brief and argument in support
thereof are herewith delivered to you, to the Supreme Court
of the United States in its court room at the Capitol in the
City of Washington, District of Columbia.

Henry W. Tapp
Walter W. Tapp

Attorneys for Petitioners.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1915.

No. _____

ALICE STATE BACH, *et al.* PETITIONERS,
VERSUS
HOUSTON PASTURE COMPANY, RESPONDENT.

**Brief and Argument in Support of
Petition for Certiorari.**

HENRY W. TAFT
49 Wall Street, New York, N. Y.
WALTER P. NAPIER
San Antonio, Texas
Attorneys for Petitioners.

JAMES P. WELLS
RUTLE & TODD
KLEBERG & STAYTON
DAUGHERTY & DAUGHERTY
J. C. HOUTS
TEMPLETON, BROOKS, NAPIER & OGDEN,
of Counsel.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1915.

No. _____

ALICE STATE BANK, *et als*, PETITIONERS,
versus
HOUSTON PASTURE COMPANY, RESPONDENT.

**Brief and Argument in Support of
Petition for Certiorari.**

To the Honorable Supreme Court of the United States:

Your petitioners, Alice State Bank, John A. Anderson, Frank L. Widergren, T. N. Pullin, Coleman-Fulton Pasture Company, E. Cubage, J. C. Daugherty, J. W. Cook, S. J. Tipton and W. S. Traxler, would respectfully show that they have this day filed with this Honorable Court their application for writ of certiorari to review the decision of the Honorable Circuit Court of the Appeals for the Fifth Circuit entered on the 27th day of November, 1915, in cause 2823 Law, styled Alice State Bank, *et als*, Plaintiffs in Error, versus Houston Pasture Company, Defendant in Error, and in support of same respectfully submit the following:

BRIEF AND ARGUMENT.

The question involved and authorities upon which petitioners rely for the granting of said writ of certiorari, are,

QUESTION INVOLVED.

The United States Circuit Court of Appeals erred in holding as a matter of law that an artificial barrier such as the waters of an arm of the Gulf of Mexico cannot be used in connection with good and substantial fences to constitute an enclosure where such enclosure is relied upon to establish adverse possession in support of title by limitation.

Your petitioners will respectfully submit in a brief manner the testimony which is offered in support of this issue, to-wit:

On June 20th, 1838, the Republic of Texas, issued to General Sam Houston bounty land warrant for 1280 acres.

On July 22nd, 1871, the executor of the estate of General Sam Houston, deceased, by deed conveyed said bounty land warrant to Coleman, Mathis & Fulton, their heirs and assigns.

Coleman, Mathis & Fulton at the time of this conveyance was a partnership engaged in the raising of cattle which they pastured upon lands owned by them in San Patricio County, Texas.

On December 30th, 1872, said bounty land warrant was located upon 1280 acres of land in San Patricio County, Texas, and adjoining lands owned by Coleman, Mathis & Fulton.

On June 22nd, 1874, a patent covering the 1280 acres as located under said bounty land warrant in San Patricio County, Texas, was issued "to the heirs of Sam Houston, deceased, their heirs and assigns forever."

In 1872 Coleman, Mathis & Fulton began to enclose their pastures by the construction of substantial fences.

Attached to this brief is an exact copy of the plat showing the pastures of Coleman, Mathis & Fulton, and some of the fences constructed, which was introduced upon the trial of this cause. We respectfully invite the Court's attention to this plat which is an exact copy of the one introduced upon the trial of this cause and of the one embodied in the record filed in the United States Circuit Court of Appeals, except however, for easy reference we have colored one portion of the Sam Houston survey green and the other red.

By reference to this plat the location of the Sam Houston Survey in the pastures of Coleman, Mathis & Fulton will readily be seen. The west one-third of the survey, which is colored green, is in the Cruz Pasture. This pasture was entirely enclosed by fences in 1878. These fences have been maintained from the date of their erection down to the time of trial. The eastern two-thirds of the survey, which is colored red, is situated in the Picatche Pasture. This pasture was entirely enclosed by 1881, with a fence on the west which runs through the Houston Survey, a fence on the north along the Chiltipin Creek (this fence is not delineated upon the map but the evidence shows such a fence to have been constructed), a fence on the east from the Chiltipin Creek to a point on the Nueces Bay called "Gum Hollow," and the Nueces Bay on the south. The fences on the east and west, which run at a right angle to the Nueces Bay are each about twelve miles in length and extend out into deep water in order to prevent ingress. The fence along the Chiltipin Creek is about seven miles in length and the water front of the Nueces Bay about six miles. The Nueces Bay is an arm of the Gulf of Mexico and at this point is about three to five miles wide and navigable by small boats, and cattle have never been known to cross it.

As soon as this pasture was fenced, all stray cattle on the pasture were rounded up and turned out and the owners notified to come and get same. About the time the first fence was constructed, which was in 1872, there was erected upon that part of the Houston Survey colored red, stock pens, tank, and a small house in which the laborers on the ranch lived. These pastures were used for the grazing of cattle and there were often as many as forty thousand cattle grazing on these pastures at one time and at all times the fences and improvements have been kept up and in repair and continuously used by those under whom your petitioners claim.

On August 7th, 1879, Coleman, Mathis & Fulton were succeeded by Coleman & Fulton, who, by partition deed duly executed and recorded, acquired title to these pastures, including the Sam Houston Survey, and the cattle thereon, and continued the business as commenced by Coleman, Mathis & Fulton, keeping up the improvements.

On January 5th, 1881, Coleman & Fulton by deed duly executed and recorded, conveyed the entire property, including the Sam Houston Survey, to the Coleman-Fulton Pasture Company, a corporation, incorporated under the laws of the State of Texas.

The Coleman-Fulton Pasture Company continued in the use of these pastures for the raising of cattle, and have kept up the fences and improvements. The pens and house erected on the Houston Survey were used until about three or four years ago. The tank and wind-mill are still in use.

In 1906 the Coleman-Fulton Pasture Company divided and sold off a portion of their lands, including the land in controversy, and it is under such conveyances that your petitioners claim.

It was admitted by respondent upon the trial of the cause that your petitioners purchased said lands and made valu-

able improvements thereon in good faith, believing at the time that they had acquired good title thereto.

Your petitioners and those under whom they claim have paid each year when and as they became due and payable, all taxes assessed against this property, and there is no claim that respondent or those under whom it claims had ever paid any part of said taxes or attempted to do so. No one other than your petitioners and those under whom they claim has ever at any time occupied or been in possession of any part of the land in controversy, and that those familiar with the use to which the land in question has been put have always understood that the same was owned and claimed by those under whom your petitioners claim title.

The enclosure made by the erection of thirty-one miles of fencing on three sides, and the use of the waters of the Nueces Bay on the fourth side was one sufficient to prevent cattle from entering and those within the enclosure from escaping; said enclosure was constantly used for the grazing of cattle from the date of its enclosure down to 1908, when a portion of the land was sold off as aforesaid. Since 1908 cross fences have been from time to time erected, so that all of that portion colored red and situated in the enclosure above mentioned were placed in smaller enclosures and title by limitation sustained, except to 486.88 acres in question.

At the conclusion of the evidence the trial court held that the record title to the land was in respondent and thereupon your petitioners by appropriate charges, as will be shown by the record in this case, respectfully requested the trial court to submit to the jury the issue as to whether your petitioners had established title by either the five or ten years statute of limitation. Those charges were refused, to which action of the court exceptions were duly saved and error assigned.

— 4 —

ARGUMENT.

There can be no question as to the real issue in this case. The charge of the trial court within itself makes clear the one issue in this case. The jury were instructed that as to all of the land except the 486.88 acres involved, title by limitation had been established, because the same was shown to have been situated in a pasture enclosed on four sides by fencing, but as to the land of your petitioners, this was enclosed in a pasture which relied upon the waters of the Nueces Bay as a barrier on one side, and that such an enclosure was not sufficient to establish adverse possession and therefore the issue of adverse possession was not one of fact for the determination of the jury.

We earnestly submit that this ruling of the court, in view of the evidence offered by your petitioners, is in direct conflict with the settled line of decisions in this State.

Every case in this State in which this question has been considered clearly recognizes the rule that natural barriers may be relied upon in connection with artificial barriers to establish adverse possession. The question is not a new or unsettled one. It has been before our courts often and has always met with the same results, the only qualification being that "in such cases, the natural barriers must be so used in connection with the artificial barriers as to indicate that they are relied upon to keep out persons desiring access thereto." This question we submit is one for the jury.

A careful reading of the statement cannot fail to make it clear that this was one of the very reasons that this pasture was fenced and that furthermore strangers and their cattle were thereafter excluded. The barriers were even built far out into deep water to prevent the passing during low tide. No one was ever known to fence their pastures along the bay front. In fact it would be a very difficult thing to do and indeed unnecessary, as the evidence shows

that the water was too deep for cattle to pass, and was, in fact, navigable by small boats. There are thousands of acres of coast lands of Southwest Texas on which cattle have been pastured for many years, and no one was ever known to construct fences along the bay front, it being only necessary to construct fences along the other sides. When this is done, it should certainly be noticed that the land enclosed is claimed, especially so where the amount of fencing used is in excess of the amount of natural barriers relied upon.

We understand, of course, the rule is that to give effect to the fences and bay shores as an enclosure of land, there must have been acts indicating that they were relied upon as such. The artificial barriers must be sufficient to notify the public that the land is appropriated. When the fences around the big pasture were completed in 1872 it will be remembered that Coleman, Mathis & Fulton immediately gave notice to all cattle owners that they had enclosed their pastures and if they had any cattle there to come and get them, as all cattle would be rounded up and turned out. This was done and thereafterwards Coleman, Mathis & Fulton and those claiming under them have never at any time permitted cattle other than their own to run upon these pastures. In addition, the testimony is uncontradicted that Coleman, Mathis & Fulton built upon the identical land involved in this litigation a tank, a well, erected a windmill and a house and in this house employes on the ranch lived. The company had many thousands of head of cattle pastured there, sometimes as many as forty thousand head.

The construction and maintenance of these three fences and the house in connection with the waters of Nueces Bay and the pasturing of cattle thereon, certainly, in our opinion, was sufficient to give notice of their appropriation of the land enclosed.

Possibly the best considered case in Texas wherein nat-

ural objects were relied upon as a barrier in connection with artificial objects to constitute an enclosure is the case of *Dunn v. Taylor*:

This case was before the Court of Civil Appeals of the State of Texas in 1906 and will be found reported in 94 S. W., p. 347. It was again before the same court in 1908 and a report thereof will be found in 107 S. W., p. 952, and was before the Supreme Court of this State in 1908, the report of which will be found in 102 Texas, p. 80.

The land in the *Dunn* case was enclosed in a pasture that was surrounded by fences on three sides and the Nueces River on the fourth. The question as to whether the Nueces River could be relied upon as a barrier in connection with the artificial barriers to constitute an enclosure in support of an adverse possession was directly involved. There was evidence to show that the Nueces River occasionally went dry, and when dry cattle were able to cross at will. In the first report of the case found in 94 S. W., p. 351, we find the following language used by the court:

"We think the evidence in this case on limitation was sufficient to go before the jury. The mere fact that the Nueces River which forms one side of the enclosure of the land at times went dry would not as a matter of law show a want of adverse possession. If all the facts and circumstances show that there was actual, visible, exclusive possession of the land it would be sufficient although at times there were breaks in the enclosure that surrounded the land. The evidence would be sufficient if it showed such acts on the part of appellee and those under whom they claim as conveyed notice to the world that they claimed the land."

In the second report of the case found in 107 S. W., p. 952, we find the following language:

"If it was the custom of people having enclosures along the Nueces River to use it as a barrier on that side, that would be a circumstance tending to show that if appellees had their land fenced on all sides

except along the river they were holding it adversely to the world. If it was the general custom to regard the river as a barrier, it tended to show not only that it did form a barrier, but an adverse holding of the land. There is no merit in the objection. If there had been proof of such custom in that county, experience would put any person of ordinary sense and discretion upon notice that if persons were fencing parcels of land on all sides but that of a contiguous stream, they were depending upon a stream to form the other side of the enclosure and to give notice of adverse claims to the land. J. S. Taylor without objection testified that the Eardley pasture ran six or seven miles along the river and that the river formed the boundary. Appellants proved by Dickens that cattle didn't cross the river much. People didn't fence it because they did not think it necessary."

The court then discussed the question of adverse possession as being proven without conclusive evidence of its enclosure, and then further said:

"We have discussed the foregoing questions and cited authorities thereon, not because we doubt that the Nueces River, together with the fences running to it, formed such an enclosure as evidenced possession and clearly defined the boundaries of the land claimed. The fact that there were times when the cattle might have escaped by crossing the river which was standing in pools would not have the effect of keeping the enclosure from showing possession. Where an enclosure consists partly of fences and partly of natural obstructions, such as rivers, mountains or cliffs, it is the province of the jury to pass upon the question whether taking into consideration the quantity, locality and character of the land, the artificial barriers, with the natural ones, were sufficient to notify the public that the land was appropriated, and to make such appropriation a notorious indication of ownership."

The court then considered the two cases of *Vineyard v. Brundrett*, 42 S. W., 232, and *Polk v. Beaumont Pasture Company*, 54 S. W., 58, which are relied upon by the Circuit Court of Appeals in the case of *Hyde v. McFadden*, and

points out wherein those cases differ from the Dunn case in that the fences built in those cases were such that taken in connection with the natural barriers were not such as would give notice that the parties were claiming the land adversely, and further states that the rule laid down in those cases sustained the position of the court in this case. Further quoting from said case:

"No one could fail to be informed of the facts that lines of fences one running parallel with and the other at right angles to a river, and connecting with the parallel lines, that the line around which the fences and river run were intended as an enclosure of the land, and when, in addition, gaps in the steep banks of the river are obstructed and cattle are being grazed on the land, notice is given that possession is distinct and hostile."

In the case at bar we have two fences running at right angles from the bay and connected on the far side by a fence running parallel with the bay, being three substantial, well constructed fences maintained for a period of forty years with the parallel fences running at right angles with the bay extending out into the bay to deep water, it is difficult to conceive that anyone could fail to notice that the land enclosed in said enclosure was being held adversely.

In the report of the case in 102 Texas, p. 80, we find the following language:

"Evidence that the Nueces River was generally used above and below the Bob Hall pasture as a barrier for pastures was admissible for the reasons that such general use of it would indicate to the owners of the land that it was thus appropriated and used by others. The mere fact that the river was not a perfect barrier against stock would not be conclusive against the claim of the possessor."

A reference to the transcript in this case will show that the defendants attempted to prove by the witness James B. Wells that he was familiar with the facts as to whether or not people owning land in the early days upon the water front recognized the bay as barriers and that the Nueces and Corpus Christi and other bays were generally used by people owning land in that section as barriers for pasture and that the owners of land fronting upon said bays did not put up fences along the bay fronts in those days as barriers against cattle and that other pastures adjoining the pasture of defendants in that locality were not fenced along the bay front, but the same was refused by the trial judge.

In the case of *Frazer v. Sereau*, reported in 128 S. W., 649, decided by one of the Courts of Civil Appeals of the State of Texas, we find the following language:

"The evidence shows that three sides of it were enclosed and the fourth side abutted on Buffalo Bayou, and that the entire tract was used by Phelps as a pasture for his cattle. This might itself be sufficient, if enclosure were essential to show that the land was enclosed. As said in *Dunn v. Taylor*, 107 S. W., 956: 'Where an enclosure consists partly of fences and partly of natural obstructions, such as rivers, mountains or cliffs, it is the province of the jury to pass upon the question whether, taking into consideration the quantity, location and character of the land, artificial barriers, with the natural ones were sufficient to notify the public that the land was appropriated and to make such appropriation a notorious indication of ownership.' (See opinion of the Supreme Court in that case, 113 S. W., 265, where such holding is expressly approved). Besides the evidence here shows that part of the fence on the South side of the Phelps tract which brought the strip of land in controversy within the enclosure was removed by the defendant Hermann when he took possession. The fence being there at the time was notice to him that the land bounded on three sides by fences and on the other side by the bayou was adversely claimed by some one else and charged him with knowledge of the fact that Phelps' possession through his tenant extended to all the land within such boundaries, whether the bayou was such a barrier as would be considered a fence or not."

The case of *Loring v. Jackson*, reported in 95 S. W., p. 19, decided by the Court of Civil Appeals of Texas, May 29th, 1906, is a well considered case, in which one of the questions was whether natural barriers could be considered as a part of an enclosure in order to maintain adverse possession.

On page 23 of the 95 S. W. in the report of this case appears a plat which furnishes a very good illustration of just how much water front was relied upon in that case to establish the enclosure, and we respectfully invite the court's inspection of the same. We quote from the opinion:

"Boden League was enclosed with other lands belonging to or controlled by Jackson in a large pasture. On the north and east the enclosure consisted alone of the impassable water barriers of Oyster Bayou and East Bay. Robertson Bayou formed a small part of such enclosure on the southeast. The enclosure on the south and west was a substantial wire fence with gate for entrance. There were about twelve miles of fence and about fifteen or twenty miles of water barrier. The fence was erected by Jackson, appellee's ancestor, for the sole purpose of enclosing the pasture in question, including the land in controversy, and, as found by the court all of the land within the enclosure was owned or claimed exclusively by appellees or their ancestor, held under authority of the owners whose titles were recognized by them. The facts are entirely different from those in *Polk v. Beaumont Pasture Company*, 64 S. W., 61, and *Vineyard v. Brundrett*, 42 S. W., 232. It is true that appellant, entering this enclosed pasture from the water side, would have encountered no obstruction of any kind in getting to the land claimed by her; but this would be the case with every enclosure fenced to any considerable extent by water barrier. Such enclosure, however, would be sufficient as a basis for statute of limitation, 'if the natural barriers are so used in connection with the artificial barriers as to indicate that they were relied upon to enclose the land and keep out other persons desiring access thereto.' *Polk v. Beaumont Pasture Company*, *supra*. The fence forming part of the enclosure in the present case ran along one of the lines of the league in controversy for nearly

the entire length of one of the sides of the league. The fence was erected by Jackson and maintained by him and appellees his successors in the title for the purpose of enclosing and thus taking exclusive possession, avers to appellant, of the land in controversy, together with other land in the enclosure claimed by appellees; and the possession thus taken and maintained was amply sufficient to give notice to appellant of such adverse holding. In addition, a fact of no value of itself, but of some force in connection with the circumstances of the enclosure, appellees kept about five thousand head of cattle in their own brand in the pasture, no other cattle being allowed therein, and kept for the greater portion, if not all, of the time a small house on the land used occasionally by persons caring for the cattle."

"We think the facts constitute such notorious adverse possession, use and occupation of the land as to bar appellants' claim under the statute of limitation. The findings of the court show that such possession was for such a sufficient length of time under the other facts found, to authorize the conclusion of law that appellees had title under both the five-year and ten-year statute of limitations."

In the case of *Randolph v. Lewis*, reported in 163 S. W., p. 649, decided by the Court of Civil Appeals of Texas on November 12th, 1913, the question as to a river front constituting a part of the enclosure relied upon to sustain adverse possession was before the court, and in passing upon same the Court said:

"The Court did not err in its conclusions of law in holding that the defendant was entitled to the land in controversy under the five years' statute of limitation for the reason that the facts as found by the court and sustained by the record fully warranted his conclusions that the defendant's possession was adverse and that he was entitled to the land under his plea of limitation. This is true, notwithstanding the fact that one side of the survey was not fenced, but was bounded by the Navasota River."

In the case of *Alley v. Bailey*, reported in 47 S. W., 821, the Court of Civil Appeals of Texas in an opinion written by Justice Williams who afterwards became Associate Justice of the Supreme Court and who wrote the opinion in the case of *Dunn v. Taylor*, above referred to, this provision is recognized and applied.

Our courts have repeatedly held that the pasturing of cattle on enclosed land is sufficient to show adverse possession.

Within the enclosure relied upon to support the claim of adverse possession in the case of *Loring v. Jackson*, 95 S. W., 23, there was included about 22,000 acres which was used for pasturing the defendants' cattle consisting of 3,000 to 5,000 head.

Again quoting from the case of *Randolph v. Lewis*, 163 S. W., 648:

"The evidence shows that the appellee, immediately after the purchase of the land, placed his deed upon record, enclosed the land, and had continuously used it for more than a period of five years as a pasture for cattle, hogs, goats, paying taxes thereon. Such use is sufficient to show adverse possession. See *Hooper v. Acuff*, 159 S. W., 934. Pasturing cattle on land enclosed for that purpose and which is under the exclusive control of the party claiming under the statute is such use and enjoyment as is sufficient." *Hardy Oil Company v. Vernon*, 124 S. W., 221.

Quoting from the case of *Hardy Oil Company v. Vernon*, 124 S. W., 224:

"The statement of appellee's witnesses that the whole country, including the Parker League, was an open range, is not inconsistent with the fact that the league was enclosed in a thirty thousand acre pasture, with no fences separating the Parker League from the balance of the lands."

"The case is not analogous to one of enclosed land upon which the claimant pastures his cattle. Pasturing the owner's cattle upon land enclosed for that

purpose and under his exclusive control is such use and enjoyment of it as would be sufficient under the five years' statute."

We quote from the case of Church v. Waggoner, 78 Texas, 200:

"It is argued that as the vendors of W. T. Waggoner only owned an undivided one-half interest in the land he was a tenant in common with plaintiff and that as the evidence failed to show that plaintiff had any notice that defendant was claiming to hold all of said land adversely to him before the 18th day of June, 1888, the court was not warranted in giving the jury any charge upon the statute of limitation."

"It was proved that about the middle of January, 1888, the defendant Waggoner completed a post and wire fence around the pasture containing about 35,000 acres of land in which were enclosed all of the land in controversy. It was proven that the pasture contained a few thousand acres not owned or leased by Waggoner that a few other people lived inside of and owned cattle that ranged within the enclosure, but that the defendant controlled the fences and gates, and except the cattle of persons permitted by him to remain in the pasture he caused the stock of other people to be turned out of it, at all times asserted his right to exercise the dominion of an owner over it. The deeds to him which were registered showed that his claim extended to the whole title and not an undivided interest in it. We think that the charge objected to and all other charges given upon the same issue of the statute of limitation correctly stated the law as applied to the pleading and evidence."

We think it hardly necessary to add anything to what has been said in the cases from which we have quoted. However, we desire the court to keep in mind that the fences constituting the enclosure were erected by Messrs. Coleman, Mathis & Fulton and Coleman-Fulton Pasture Company, for the sole purpose of enclosing their land so as to give them the exclusive use and control of same. Prior

to the fencing it was the custom of cattle owners to permit their cattle to range at large over the country, and that the cattle of many other owners ranged upon the land of Coleman, Mathis & Fulton and their successors. This, evidently was unsatisfactory, and therefore, Coleman, Mathis & Fulton, in 1872, fenced what is known as the big pasture and gave notice to cattle owners to come and get their cattle, as thereafter the land enclosed was to be used solely by the owners thereof. And never since that day have the cattle of any other than the owners of these pastures been permitted to run thereon, nor has any part of the said land at any time been used by any one for any purpose except by them and those claiming under them.

The exclusive use in fact has been so open, notorious and hostile that no one has ever attempted to use any part of the land involved. The plaintiff and those under whom it claims has never at any time for one moment been in possession of one foot of the land, and furthermore, we doubt if any of them has ever seen it.

Coleman, Mathis & Fulton, and Coleman-Fulton Pasture Company pastured thousands of head of cattle upon this enclosure. The Pistola Camp, which is on the land involved, was for many years one of the headquarter camps on the ranch. The evidence shows that this enclosure was used from 1872 down to 1908, when the Coleman-Fulton Pasture Company commenced the sale of these lands. Fence riders rode the fences to see that they were kept up and strangers kept out. Everyone knew these pastures as those of the Coleman-Fulton Pasture Company. No one else was ever heard to assert a claim of ownership to any part of the land involved. No one but your petitioners and those under whom they claim ever paid any taxes on any portion of this land, and the evidence shows that they paid same each year and every year as they accrued.

After thus enjoying the exclusive use and possession of the property for many years, the Coleman-Fulton Pasture Company in 1908 sold all but about 154 acres of the 1280 acres involved. All of such purchasers the evidence shows purchased the property in good faith and went into actual possession of the land purchased and in good faith erected substantial improvements thereon.

We unhesitatingly submit that the record in this case was so overwhelmingly in support of the defendants' contention that their peaceable possession of this property was such as to invoke the statutes of limitation and under the authorities in this State the trial court should have submitted this issue to the jury.

The judgment of the United States Circuit Court of Appeals in this case, which is final, is in conflict with the settled line of decisions in this State, a number of which we have hereinabove cited and quoted from, and if this judgment is permitted to become a precedent, the title to thousands of acres of land in Southwest Texas which have long been considered to be without question, in view of the decisions of this State, will be placed in jeopardy, and it is of the utmost importance that this question should be passed upon by this Honorable Court of last resort.

It is respectfully submitted that the writ of certiorari should be granted as prayed for,

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JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

ALICE STATE BANK ET AL.,

Petitioners,

against

HOUSTON PASTURE COMPANY,

Respondent.

No. 154,
October Term,
1917.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, to Review a Decree of that Court Affirming the Decree of the District Court of the United States for the Southern District of Texas.

BRIEF FOR PETITIONERS.

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Supreme Court of the United States.

ALICE STATE BANK, ET AL.,
Petitioners,

AGAINST

HOUSTON PASTURE COMPANY,
Respondent.

No. 154, October Term,
1917.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT, TO REVIEW A DECREE
OF THAT COURT AFFIRMING THE DECREE OF THE DISTRICT
COURT OF THE UNITED STATES FOR THE SOUTHERN DIS-
TRICT OF TEXAS.

BRIEF FOR PETITIONERS.

Statement of the Case.

This cause is brought here upon a writ of *certiorari* issued by this Court to the United States Circuit Court of Appeals for the Fifth Circuit, on the 26th day of May, 1916 (Trans., p. 178). The action was commenced on May 30th, 1914, by the Houston Pasture Company, a Louisiana corporation, in the United States District Court for the Southern District of Texas. The cause of action was for trespass to try the title to 1,280 acres, known and hereinafter referred to as the

"Houston Survey," situated in San Patricio County, Texas, and judgment was prayed for for damages against certain of the defendants for unlawfully withholding the property from the plaintiff. The Coleman-Fulton Pasture Company was made a party defendant by amendment on November 7th, 1914, and certain of the defendants were impleaded as warrantors of the title of other of the defendants who had been originally made parties.

The action was tried in the District Court of the United States for the Southern District of Texas, and at the close of the evidence the court found as a matter of law that the legal title to the 1,280 acres of the Houston Survey was vested in the plaintiff, and that it was entitled to recover the entire tract except such parts thereof as might "have been acquired by one or more of the defendants by reason of the statute of limitation" (Trans., p. 53).

The answers of the several defendants were in substance identical and alleged, (1) that they were seized and possessed of the title in fee simple to the land claimed and occupied by them at the commencement of the suit, or which had theretofore been claimed and occupied by them, and (2) that even though their record title was defective they had acquired a good legal title under the three-year, five-year and ten-year statutes of limitation of the state of Texas.

In support of the defense of the statutes of limitation referred to, the defendants alleged that they and those under whom they claimed title, had been in actual, peaceful, adverse and exclusive possession of the land sued for under a claim and color of title, continuously for more than 20 years prior to the commencement of the suit, and that the claim of title was made under deeds duly registered. Evidence in support of the adverse possession of the land included the payment of taxes, the using and cultivating of the land, and its enclosure by natural and artificial barriers intended to exclude and actually excluding all adverse

claimants. The evidence in relation to adverse possession will be more particularly referred to below. The evidence given by the defendants was not controverted by the plaintiff. On this branch of the case, therefore, the only question presented was whether, from the undisputed evidence, inferences might have been made by the jury that the possession of the defendants had been of such a character that any of the statutes of limitations were applicable.

The Facts on Which the Legal Title Depends.

On June 28th, 1838, the Republic of Texas issued to General Sam Houston, for eleven months' military service, Bounty Land Warrant No. 3894, entitling him to locate 1,280 acres (Trans., p. 67). A survey of property in Polk County appears to have been made under this warrant in 1853 (Trans., pp. 77, 78). General Houston, however, never went into possession of the lands thus surveyed, and they were never patented to him; on the contrary, they were subsequently re-surveyed for another person under another warrant (Trans., pp. 78, 79, 80).

General Houston died in 1863 (Trans., p. 66). His will was probated in Walker County, Texas, and by its terms his executors were given full power of sale, after they had filed an inventory, and their actions were to be independent of the Probate Court (Trans., p. 69). The inventory was filed in December, 1863 (Trans., p. 73).

On July 22, 1870, the legislature of the State of Texas passed an act entitled "An Act for the Relief of the heirs of General Sam Houston, deceased" (Trans., p. 64). This act referred to and approved the Land Warrant issued to General Sam Houston in 1838, and it was "declared to be a just claim from its original date, against the State of Texas." The Commissioner of the General Land Office was by the act "authorized to issue a patent on the same in the name of the heirs of General Sam Houston, deceased."

Section 2 of the Act provided as follows, viz :

" That the owners of any land certificate located on land in conflict with the previous location made by virtue of the foregoing warrant and not patented are authorized to locate the same on other lands; * * * "

On July 22, 1871, J. Carroll Smith, being then the only surviving and duly qualified executor of the estate of General Houston (Trans., pp. 71, 72, 73), for a consideration of \$600, transferred to Coleman, Mathis & Fulton, a co-partnership, engaged in the cattle business in Texas, the original Bounty Land Warrant No. 3894 (Trans., p. 74). On December 30, 1872, this land warrant was located by official survey upon 1,280 acres of land in San Patricio County (Trans., p. 68), which was in a pasture then occupied by Coleman, Mathis & Fulton in their cattle business (Plat B, Trans., pp. 115, 94, 95, 96, 98, 100, 102). The transfer of the warrant to Coleman, Mathis & Fulton was, on the 27th day of July, 1873, duly recorded in the Deed Records of San Patricio County, Texas (Trans., p. 74).

No patent was taken out under the provisions of the act of July 22, 1870, until June 22, 1874, when the Governor of the State, " by virtue of the power vested in me (him) and in accordance with the laws of this State in such case made and provided," issued a patent granting "to the heirs of Sam Houston, their heirs or assigns forever," the 1,280 acres of land above referred to. The patent also relinquished to the heirs and their heirs or assigns forever "all the right and title in and to said land heretofore held and possessed by the said State" (Trans., p. 65). The plaintiff also offered testimony showing the transfer of the Sam Houston Survey by all of the heirs, excepting those representing a one-quarter interest, to the Houston Pasture Company, the respondent herein (Trans., pp. 65, 66, 67).

The Facts on Which the Petitioners Claim Title by Adverse Possession.

In 1872 Coleman, Mathis and Fulton commenced to fence their land, which then amounted to about 100,000 acres (Trans., p. 97). They first built the "Pistola fence" (Trans., pp. 94, 95, 96, 97, 98, 99, 100, 102), which is the fence designated on Exhibit B as the "old pasture fence," running through the Houston Survey so as to throw about one-third of that tract to the west, and extending from Nueces Bay on the south to Chiltipin Creek on the north; then, jointly with Waelder, whose lands adjoined on the north, a fence along Chiltipin Creek from Pistola fence down the creek to Copano Bay (Trans., pp. 95, 97, 98, 100); then a fence from Puerto Bay to Corpus Christi Bay—this fence being along lands of one McCampbell, who owned the peninsula between the last mentioned two bays (Trans., pp. 95, 97, 100, 102). These fences were all completed by the end of 1873 (Trans., pp. 100, 102). The enclosure thus formed, which included the easterly two-thirds of the Houston Survey, was bounded along the whole of the westerly and northerly sides and part of the easterly side by fences, and through the rest of its extent by the waters of Copano, Puerto, Corpus Christi and Nueces Bays. Afterward, and before the end of 1878, Coleman, Mathis and Fulton built fences, which, with the Pistola fence, completely enclosed the tract known as the Cruz Pasture, which included the westerly one-third of the Houston Survey (Trans., p. 101). Not later than 1881 or 1882 (Trans., p. 104), and probably in 1878 (Trans., p. 100), the Doyle Waterhole fence was built, completing the enclosure of what is shown on Exhibit B and known as the Picatohe Pasture, which included the easterly two-thirds of the Houston Survey.

The trial judge held that as matter of law the defendants had title by adverse possession to the portion of the Houston

Survey lying within the Cruz pasture, and with respect thereto directed a verdict in favor of defendants. In respect to that part of the Houston Survey lying to the east of Pistola fence, and included in the Picatche Pasture, however, the Court instructed the jury that title by adverse possession had not been proven, because there "is water front of fourteen miles" and "the water front is held by the Court not to be such a barrier as would put in motion the statutes of limitation." The evidence as to the extent of water front does not support the Court's statement of fact in the sense in which it obviously is made, since the only water front serving as a barrier extended along Nueces Bay for a distance of from six to seven miles (Trans., p. 104), while a fence along Chiltipin creek had constituted an effective barrier since before 1873.

The situation will be better appreciated by reference to Exhibit B which appears in the transcript opposite page 130. Roughly speaking the Picatche pasture is a rectangular plot containing upwards of 40,000 acres and running from Chiltipin creek on the north to Nueces Bay on the south. It is about twelve miles long in the north and south dimension, and from six to seven miles broad in the east and west dimension. It was bounded on the west by the Pistola fence, built in 1872, and on the east by the fence below referred to as the Doyle Waterhole fence, built not later than 1882. Exhibit B does not show any fence on the north, but the testimony shows that in 1872 a fence was built along the Chiltipin creek from Pistola fence to Copano Bay; that at a date not shown the creek was dammed at a point to the east of the Doyle Waterhole fence and the water was backed up so that to a point about A on Exhibit B no fence was necessary, and that after that the fence to the east of Thomas Coleman's ranch (Ex. B) was abandoned, but that from Coleman's ranch west it was kept up till the time of trial, and that the creek where the fence was abandoned was deep enough to prevent the crossing of stock (Trans., p. 99).

The testimony on which we base the claim that the jury might and should have inferred that the Chiltipin fence continued along the whole northerly boundary of Picatoche Pasture down to date of trial is as follows:

The witness John Waelder testified:

"I join fences with them on the north along what is known as Chiltipin Creek" (Trans., pp. 97, 98); "That fence to and down the Chiltipin Creek was the joint fence built by my father and it has been kept up jointly by my father and the company and after he died by myself and the company" (Trans., p. 99). "After the building of that fence in 1872 the creek did not form any part of the boundary of our division" (Trans., p. 98).

The witness Newt. Rachal testified to the building of the Chiltipin fence among other fences to a point where the creek "made no fence" (Trans., p. 100). He added that while he had not been familiar with the country since 1898, up to that time "the fences were kept up" (Trans., p. 102).

The witness R. K. Reed testified that he worked for Coleman, Mathis & Fulton, Coleman & Fulton and Coleman-Fulton Pasture Company from 1878 "off and on for about fourteen years until about 1900 or 1901"; that "during all that time the fences were kept up", and that it was part of his duty to "ride the fences" and keep them up (Trans., p. 104).

Joseph F. Green, superintendent of the Coleman-Fulton Pasture Company since 1900 (Trans., p. 109), testified that when he went to work for the company in 1900 "the Chiltipin Creek was all fenced except for a little ways south of T. M. Coleman's ranch" (Trans., p. 110). "Most of them are still as they were. I was studying to see if any of them have been changed. If there have been any changes they have been changed in the last two or three years but very few or minor changes have been made. Wherever they have been changed they have been fenced up by farmers generally putting in fences" (Trans., p. 111). And that at the date of his tes-

timony the "circumscribing fences" still continued except for some minor changes that had been made when farmers put up their fences (Trans., p. 111), and that during his connection with the company there had never been any "lapse of time when the property was not fenced" (Trans., p. 111).

There is no testimony whatever to show, or tending to show, that any part of the Chiltipin fence from Coleman's ranch west was ever removed.

The Pistola fence was kept up until the time of trial (Trans., pp. 108, 111). The Doyle Waterhole fence was kept up till 1910 or 1911, except where it had been torn down when small farms were laid off and fenced, and in those cases the remaining parts had been promptly joined on to the farm fences (Trans., p. 11).

Since the completion of the Pistola fence in 1872 there have been various improvements in the Picatche pasture and particularly on the Houston Survey, which will appear more in detail below. Among these have been the building of the town of Taft laid out by Coleman-Fulton Pasture Company on the line of the San Antonio and Aransas Pass Railway, which also has been built since 1872 (Trans., p. 111). The evidence shows, however, that the enclosures of the pasture indicated above have been continuously maintained since they were completed.

When the Pistola fence had been completed in 1872 all cattle which had theretofore strayed in the pasture were rounded up and the owners were notified to come and take possession of them (Trans., pp. 98, 100, 101, 115). After that time no cattle other than those belonging to Coleman, Mathis & Fulton were permitted to run on any of the pastures composing their tract of 100,000 acres (Trans., p. 97, 101, 102, 112, 115). Some of the interior fences were not constructed until after the completion of the fence which enclosed the entire tract. Upon the completion, not later than 1881-1882, of the Doyle Waterhole fence, as

we have already said, the Picatche Pasture was completely fenced on the north, east and west, and the east and west fences were extended out into Nueces Bay to deep water (Trans., p. 95). The Nueces Bay is about three to five miles wide at this place. The evidence is undisputed that it is of such depth along the Picatche Pasture and at the end of the east and west fences enclosing that pasture, that no cattle had at the time of the trial ever been known to go around the end of the fences (Trans., p. 112). There are 31 miles of fencing around the Picatche Pasture, and the water-front upon Nueces Bay is about six to seven miles in length.

At or about the time the Pistola fence was built, Coleman, Mathis & Fulton erected in the Picatche Pasture upon the Sam Houston Survey a mill, known as the Pistola Mill, pens for cattle, a water tank, and a small house in which Mexican workmen lived who were employed upon the ranch (Trans., pp. 98, 100, 102). In all of their pastures Coleman, Mathis & Fulton at times had as many as 40,000 head of cattle (Trans., p. 94). The fences enclosing the several pastures were always kept in good repair, fence riders were employed to see to their upkeep (Trans., pp. 98, 102, 104, 110, 111) and Coleman, Mathis & Fulton continually used the improvements which were erected upon the portion of the Sam Houston Survey which was within the Picatche Pasture (Trans., pp. 96, 98, 103, 104, 105, 106, 107).

On August 7, 1879, Coleman, Mathis & Fulton were succeeded by the firm of Coleman & Fulton, which by a partition deed acquired title to certain of the pastures, including the Picatche Pasture and the portion of the Sam Houston Survey lying in that pasture, as well as to the cattle then pastured thereon. The new firm continued the business of the old firm and kept up all the fences around the Picatche Pasture, as well as the improvements on the Sam Houston Survey (Trans., p. 93).

On January 5, 1881, Coleman & Fulton conveyed all of the pastures which they then owned, which still included the Cruz Pasture and the Picatche Pasture, and, of course, the Sam Houston Survey lying within those pastures, to the Coleman-Fulton Pasture Company, a corporation incorporated under the laws of the State of Texas (Trans., p. 76). That company has continued ever since to use the pastures for cattle raising and has continuously kept up the fences and other improvements except that the pens and the houses erected on the Sam Houston Survey were abandoned about three or four years before the trial, although the tanks and the mill on that survey were still in use at the time of the trial (Trans., p. 106). The situation thus described as existing in 1881 continued for about 22 years and until the Pasture Company in 1903 laid out and fenced a number of small farms of 200 acres each, rectangular in form. The longer boundaries of these farms were at right angles to the line of the San Antonio and Aransas Pass Railroad, and several of the farms extended over on to the Houston Survey and occupied a triangular portion of that Survey at its northeasterly corner, comprising about 153 acres. These farms, including the portion lying within the Houston Survey, were put in cultivation in 1904 and have been cultivated each year ever since (Trans., pp. 108-109). In 1905 the Pasture Company built a fence enclosing about 2,000 acres of land, including all of the Sam Houston Survey that lay within the Picatche Pasture, other than said 153 acres (Trans., p. 107). This enclosure was used as a horse pasture for several years and the enclosing fence still remained at the time of the trial (Trans., p. 107; also Exhibit A). In 1908 all of the Sam Houston Survey in both the Cruz and the Picatche Pasture, except the 153 acres above referred to, was sold in small farms to a number of purchasers. Some of these farms changed hands and in May, 1914, the following corporations and persons held the record title to the following number

of acres respectively, comprising in the aggregate the entire 1,280 acres of the Sam Houston Survey, viz :

Coleman-Fulton Pasture Company	153.64
T. N. Pullin.....	166.08
W. J. Gibson.....	208.12
Alice State Bank.....	160.
Widergren & Anderson.....	160.
A. A. Harrell.....	7.85
John A. Harrell.....	80.
G. W. Martin.....	80.
W. E. Schmalstieg.....	80.
A. Sibers.....	80.
William Truax, A. C. McDowell, H. M. McDowell, C. L. Vickers and William Spessord.....	32.31

At the close of the evidence the defendants requested the court to submit the issues of fact to the jury upon questions of fact set forth in a number of proposed special charges. These charges were framed upon the theory that on the undisputed proof the court should have directed the jury to find that the plaintiff had failed to show that it had any legal title to any portion of the Sam Houston Survey, and that even if the proof showed that the plaintiff had such legal title it had been lost and had become vested in the defendants in accordance with the extent of their several claims, by adverse possession under the several statutes of limitation of the state of Texas. The court refused to send the case to the jury upon any of the special charges thus submitted and on his own motion instructed the jury that the legal title to the whole of the Sam Houston Survey was, as a matter of law, in the plaintiff, and that, therefore, the plaintiff was entitled to recover all of the Sam Houston Survey except so far as title thereto had been acquired by any of the defendants by adverse possession for a period prescribed by the statutes of limitation. The court further held that the title by adverse possession had been acquired

by the defendants who had a record title to any part of the Sam Houston Survey lying within the Cruz Pasture; that Gibson had acquired a similar title to 280.12 acres and the Coleman-Fulton Pasture Company to 153.64 acres, but that the plaintiff was entitled to recover all of the rest of the survey, being that lying within the Picatche Pasture and owned by the other defendants above named. The distinction as to the adverse possession of the land lying within the Cruz Pasture and that lying within the Picatche Pasture rested, in the opinion of the Court, on the fact that the land in the Cruz Pasture had been enclosed on all four sides by fences, while in the case of the land lying within the Picatche Pasture the owners relied upon the "fourteen miles" of water front as constituting a barrier sufficient to indicate an exclusive claim of title within the rule of law relating to adverse possession. The Court held, however, that the water front did not constitute a barrier sufficient for that purpose (Trans., p. 53). As to the 280.12 acres claimed by Gibson and 153.64 acres claimed by the Coleman-Fulton Pasture Company, the proof was sufficient, as the Court held, to show adverse possession by enclosure by separate fences for a sufficient length of time to make the statute of limitation effective.

The jury rendered a verdict in accordance with the instructions of the court (Trans., pp. 54 and 55) and judgment was entered accordingly. Exceptions were taken to the rulings of the Court and an appeal taken to the Circuit Court of Appeals (Trans., p. 63).

The Circuit Court of Appeals affirmed the judgment upon a *per curiam* opinion of which the following is a copy, viz :

"BY THE COURT: On the evidence shown in the transcript the legal title to the land in controversy is in the Houston Pasture Company. The plaintiffs in error show no sufficient title by limitation (See *Hyde v. McFadden*, 140 F., 433).

"We conclude from the evidence that the judge below properly directed a verdict for defendant in error. Affirmed."

The Several Statutes of Limitation Relied Upon.

Article 5674 of the Revised Statutes of the State of Texas provides as follows :

" Every suit to be instituted to recover real estate as against any person having peaceable and adverse possession thereof, cultivating, using or enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterward."

Article 5675 of the Revised Statutes of the State of Texas provides as follows, viz :

" Any person who has the right of action for the recovery of any lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterwards."

It will be observed that the five-year statute applies only where the person having possession of the land claims under a deed duly registered and is paying taxes thereon, while in the case of the ten-year statute these indicia of adverse possession are not specifically required.

Article 5676 provides that the adverse possession contemplated in Article 5675 is not to embrace more than 160 acres

" including the improvements or the number of acres actually enclosed, should the same exceed one hundred and sixty acres ; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument."

By Act of 1891 the law respecting the ten-year statute was amended by the enactment of a new article providing that :

" Possession of land belonging to another by a person owning or claiming five thousand acres or more of land enclosed by a fence in connection therewith, or adjoining thereto, shall not be the peaceable and adverse possession contemplated by Article 5675, unless said land so belonging to another shall be segregated and separated by a substantial fence from said lands connected therewith or thereto adjoining, or unless at least one-tenth thereof shall be cultivated and used for agricultural purposes, or used for manufacturing purposes, or unless there be actual possession thereof" (Revised Statutes, Article 5678).

Article 5682 provides that

" Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them."

Article 5680 defines " peaceable possession " as being " such as is continuous and not interrupted by adverse suit to recover the estate."

Article 5681 defines " adverse possession " as an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

Article 5679 provides that whenever action is barred by possession under any of the provisions above cited, the person having peaceable and adverse possession under the provisions of the statutes above referred to " shall be held to have full title, precluding all claims."

Errors Urged Upon This Appeal.

I. The first error urged upon this appeal is the refusal of the court to give to the jury the special charge requested by

the defendant which is embodied in Assignment of Error No. 5 (Trans., p. 133). This charge relates to the five-year statute of limitations of the State of Texas. The first part of the charge relates to the general rule of law as to what constitutes adverse possession, without special reference to the evidence in this case, and then requests the court to charge as follows, viz.:

"Therefore, if you believe from the evidence that the defendants, and those under whom they claim, have had peaceful and adverse possession of the Sam Houston Survey in controversy, cultivating, using and enjoying the same, and paying taxes thereon, and claiming under a deed or deeds duly registered, for a period of five consecutive years at any time between the 26th day of August, 1879, and the 30th day of May, 1914, then you should return a verdict for the defendants, unless you find for the plaintiff under other instructions given you."

Error is assigned for the refusal to make this charge on the grounds (a) that there was evidence tending to show that the defendants and each of them had had adverse possession of the property in question, using and enjoying the same, paying taxes thereon and claiming under deeds duly registered, for more than five years prior to the filing of the suit, and that such possession had been continuous and under a claim of right inconsistent with and hostile to the claim of all others; (b) that the evidence in relation to such adverse possession should have been submitted to the jury, and (c) that the defendants would have been entitled to a verdict in their favor on the theory that they had acquired title to the land in controversy under the five-year statute of limitations.

II. The Assignment of Error No. 6 (Trans., p. 134) raises the same question as Assignment No. 5, excepting that title is therein claimed by adverse possession under the ten-year statute of limitations.

III. Assignment of Error No. 7 (Trans., p. 135) raises the point that to show title by adverse possession under the

statute of limitations, it is not necessary to show that the land claimed was enclosed during the statutory period

"on every side by artificial enclosure, but, as regards enclosures, a natural barrier in part may be shown to have been utilized, provided it be of such a character as, in connection with the fence, will constitute a substantial enclosure of the land, and provided it is sufficient to indicate dominion over the premises and give notoriety to the claim of possession and title. The natural barriers in such case must be so used in connection with the artificial barriers as to indicate that they are relied on by the user thereof to enclose the land and to keep out persons desiring access thereto."

The claim of error is based upon the fact that there was evidence tending to show that the natural barrier in connection with the fences on three sides of the property in question was sufficient to constitute a substantial enclosure and to indicate dominion over the premises and give notoriety to the claim of possession and title, and that the natural barrier was relied on by the user thereof to enclose the land and to keep out persons desiring access thereto. It was also claimed that if the jury had found the facts as summarized in the request, the defendants were entitled, as a matter of law, to a finding that their possession of the land was adverse within the meaning of the statute of limitations.

The request to make the special charge referred to in this assignment of error sufficiently raises the question as to whether, upon the facts proven, the Nueces Bay, in connection with the two fences which ran out to the deep water of the Bay, constituted a barrier which the jury were entitled to find was sufficient, with all the other circumstances proven, to indicate adverse possession under the general rule of law which had been embodied in the previous requests of counsel for special charges to the jury.

IV. Assignment of Error No. 10 more specifically raises the point that the court erred in not instructing the jury that, if they believed that the land was enclosed by fences on three

sides and bounded by water on the other side, and that the water was "of such nature and depth as to constitute a barrier on such fourth side", such enclosures would constitute a sufficient enclosure under the defense of the ten-year statute of limitations. And the request proceeded as follows :

"And if you find that such enclosure was peaceful, adverse, and continuously maintained by said parties, or any of them, for ten years at any time prior to the bringing of this suit, and that during such time they, or any of them, cultivated, used or enjoyed such land, you will find in favor of defendants, unless you find that during such particular ten years some of the heirs of Sam Houston were married women with husbands living, in which latter case you will be governed in your findings by the court's charge on the effect of marriage of women on the running of limitation."

The assignment of error proceeds to point out that the evidence showed and tended to show

"that the water of the bay or gulf that was utilized, (in connection with fences on three sides), to enclose for a time the land in controversy, was of such nature and depth as to constitute a barrier on that side of the enclosure; and, if the facts were as submitted by the request, then as a matter of law the said fences and water barrier constituted the enclosure required by the ten-year statute of limitations, as fully appears by defendants' bill of exception to the action of the court."

Assignment of Error No. 11 may be mentioned in connection with the foregoing assignment of error as it relates to a special charge which was requested concerning the effect of the statute of limitations to shut off the right of a married woman. It points out that the statute of limitations would run against a married woman after July 29, 1896.

Assignments of Errors 23 and 26 refer to the portion of the charge of the Trial Judge relating to adverse possession, wherein he states that the case is controlled by the case of *Hyde vs. McFadden*, 140 Fed. Rep., 433, where the Court held that the waterfront was not "such barrier as would put in motion

the statutes of limitation." The court held that under the rule in *Hyde vs. McFadden*, the petitioners had not shown adverse possession so as to set in motion the statutes of limitations, because the entire property claimed to be held by adverse possession had a waterfront of 14 miles. Error was assigned in relation to the charge of the Court, (1) because the matter should have been submitted to the jury as to whether the possession of the petitioners was adverse so as to entitle them to have the statutes of limitations applied; (2) because the water barrier was 7 and not 14 miles in length, as stated by the Court; (3) because the facts in *Hyde vs. McFadden* in respect of the water barriers under consideration in that case, are so different from those in the case at bar as to make the decision in that case wholly inapplicable, and (4) because the evidence showed numerous facts which are enumerated in (C) and (D) in the assignment of error, all tending to show such adverse possession on the part of the petitioners and their privies in the title, and the case should have been submitted to the jury to find whether such adverse possession existed.

V. In the charge and instruction to the jury the Court stated that it had reached the conclusion, and it advised the jury, that—

"By reason of the Special Act of the Legislature passed July 22, 1870, being an 'An Act for the relief of the heirs of General Sam Houston,' and in pursuance of the location and survey of the land in question and patent by the Governor of the State of Texas to the heirs of General Sam Houston, and to their heirs and their assigns, that the legal title to the 1,280 acres of land in question is in the plaintiff in this case, and the plaintiff is entitled to recover all of the said 1,280 acres of land, less such parts thereof, as may have been acquired by one or more of the defendants by reason of the Statute of Limitation."

This was excepted to (Defendant's Bill of Exceptions No. 23). This exception, and assignment of errors numbers 22, 24

and 27, sufficiently raise the point that the charge was erroneous in that the Houston Pasture Company did not show any right or title on which it was entitled to recover as against the defendants or any of them, and that the defendants had what was for all of the purposes of the action, independently of the statutes of limitations, valid, legal title to the whole of the premises in suit.

All of the errors referred to in the assignments of error were sufficiently raised on the trial by exceptions duly taken and the defense based upon the several statutes of limitations was duly raised by the answers of all of the defendants (Trans., pp. 5, 6, 7, 8, 9, 12, 13, 14, 15, 19, 23, 24, 25, 27, 28).

FIRST POINT.

The Court erred in not instructing the jury that the defendants had had peaceable and adverse possession of such character and for such a period as to defeat under both the Five-Year and the Ten-Year statutes of limitation the plaintiff's claim of title; or in any event in failing to submit the case to the jury under instructions that if they found that there had been such peaceable and adverse possession for the period prescribed by the statutes of limitation, a verdict for the defendants should be rendered.

Most of the evidence offered in behalf of the defendants was not controverted by the plaintiff. Furthermore, although it became necessary for the defendants, in order to bring themselves within the provisions of the statutes relating to limitations and defining peaceable and adverse possession, to offer in evidence much formal testimony, practically the only point raised by

the plaintiff upon the question of the application of the statutes was whether the Nueces Bay constituted, in connection with the use made of the Picatche Pasture, and the extension of the fences into the bay in such a way as to prevent passing, such a barrier as to satisfy the definitions contained in Articles 5680 and 5681 (*supra*) of peaceable and adverse possession.

A brief reference to the uncontradicted testimony may be suitable :

We have already referred to the transfer to Coleman, Mathis & Fulton on July 22d, 1871, by the executor under the will of General Sam Houston of the Original Bounty Land Warrant No. 3894 and to the location under that warrant upon 1280 acres of land in San Patricio County known as the "Sam Houston Survey." The transfer of the warrant was duly recorded on the 17th day of July, 1873. The Sam Houston Survey was held by Coleman, Mathis & Fulton and by their successors, and was ultimately conveyed to the Coleman-Fulton Pasture Company, and held by it until 1908, when it was subdivided into small farms. Ultimately the Survey it became vested, by deeds duly recorded, in the several defendants as indicated above. It is not necessary here to trace these deeds, since no question was made upon the trial but that the defendants who are the petitioners herein traced a record title, through deeds duly executed and recorded, back to the original transfer of the Bounty Land Warrant by the executor of General Sam Houston in 1871. In one case title has been transmitted through foreclosure, but in that and in every other case the chain of title is complete (Trans., pp. 76, 77, 79, 81, 82; Stipulation, p. 118).

Evidence as to Use and Occupancy.

In 1872 Coleman, Mathis & Fulton claimed to own about 100,000 acres of land (Trans., pp. 95, 97). In that year they commenced to enclose the entire ranch by fences

and by 1878 the fences had been completed (*infra*). The outside fences appearing upon the diagram, Exhibit B, indicate substantially what was enclosed in 1872, except that the diagram does not show the fence along Chiltipin Creek. It does, however, show that on the south the ranch was bounded by Nueces Bay and Corpus Christi Bay, and on the east and north by Puerto Bay and Copano Bay and a fence between Coleman, Mathis & Fulton and McCampbell, all of the bays referred to forming a part of the outside boundaries of the property. On the north Chiltipin Creek later formed the larger part of the Northern boundary. It was not, however, at the outset depended upon as barrier enclosing the property, since a fence was maintained along its entire course, as we will point out below (Trans., p. 95). It is not necessary here to review the evidence in relation to the building of the fences which enclosed the property or any part thereof, excepting those which surrounded the so-called Picatohe or Pistola Pasture, since all of the plots claimed by the petitioners whose titles are affected by the judgment appealed from, lie within that part of the Sam Houston Survey which is included within the Picatohe or Pistola Pasture. The evidence is abundant and uncontradicted that that pasture was enclosed on the north, the east and the west by permanent fences commenced in 1872, completed, as we claim, before 1878, and certainly not later than 1882, and maintained substantially in the same position down to the time of the trial. The fences bounding the Pistola Pasture on the south extended out into Nueces Bay to deep water (Trans., pp. 97, 98, 100, 101, 102, 104, 107, 108, 110, 112, 115).

The fences which were built were not all barbed wire fences, but were the best fences then known, some being barbed wire and some ribbon wire (Trans., p. 95). One witness testified that barbed wire was not introduced into the country until 1886, and that in building the original fences black wire or

galvanised wire was used to some extent. But no question was made as to the sufficiency of the fences as barriers, and the decision of the trial judge in favor of the claimants to the land which lay in that portion of the Sam Houston Survey which was inclosed in the Cruz Pasture, assumed that the fences were a sufficient enclosure to indicate adverse possession. The fences were all kept up, "fence riders" being employed for that purpose. They were also replaced from time to time by new fences (Trans., pp. 104, 110, 111). On the subject of the continuous maintenance of the fences the entire period from 1872 to the date of the trial is covered by the testimony of R. K. Reed (Trans., p. 103), Joseph F. Green and Newt. Rachal (pp. 100, 109). The witness Rachal was familiar with the fences down to 1898 and testifies that they "were kept up and they later put barbed wire on them; I think four strands. Coleman, Mathis and Fulton built these fences and kept them up during all the time that I knew them." Mr. Green became Superintendent of the ranch in 1900, and he continues the testimony as to the fences from that date.

The fences enclosing the Pistola Pasture

"extended out into deep water sufficient to keep the cattle or stock from crossing. The fences were built out into the Bay. The Nueces Bay averages about six feet in depth * * *" (Fulton, Trans., p. 95).

John Waelder said he was familiar with both the bays that lie to the south of the property of the Coleman-Fulton Pasture Company; one of those, of course, being the Nueces Bay: and he says:

"I can't tell their approximate depth, but they were deep enough to prevent cattle crossing, unless they swam it" (Trans., p. 98).

Mr. Green said that he had "never had any cattle to cross any of these bays," referring among others to Nueces Bay, which he said was from three to five miles wide (Trans., p. 112).

There is also abundant evidence to show that the petitioners and their predecessors in the title openly occupied the Picatche pasture for their own uses to the exclusion of all others. The pasture was used for "the raising of cattle and horses." The firm of Coleman, Mathis & Fulton often had as many as 40,000 head of cattle grazing over their entire property (Trans., p. 94). There was erected in January, 1886, on that part of the Picatche Pasture included in the Sam Houston Survey, the Pistola Mill and improvements connected therewith; also the Pistola pens, built long before the mill. There was also a horse pasture for saddle horses, and the Picatche Pasture was one of the "headquarters for receiving and distributing cattle" (Trans., p. 95); while the Houston Survey, with its cattle pens, houses and horse corral was itself one of the camping places of the ranch; indeed, it was a headquarters camp (Trans., p. 107). A portion of the property was enclosed in a fence which was in cultivation "because when we put up that mill we had some roasting ears and other vegetables from the Mexican who had charge there." There was a small house located on the Sam Houston Survey within the Picatche Pasture, which was occupied by a Mexican who was there "for the purpose of keeping charge of the saddle horses and we had accommodations for the cow crowd that came in that neighborhood and for general ranch purposes" (Trans., pp. 95, 96, 98). This testimony refers to a period extending from 1872 to 1902 (Fulton, Trans., pp. 93-95). The Picatche pasture was

"used for grazing cattle by Coleman, Fulton & Mathis. I have never at any time heard of anyone besides Coleman, Fulton & Mathis, Coleman & Fulton, and the Coleman Fulton Pasture Company using that pasture. I never heard of any other person's cattle being permitted to graze or run in there after the pasture was fenced in 1872" (Trans., p. 101).

This was testified to by a witness named Newt. Rachal, who was in the stock business and had known the property

since 1871 (Trans., p. 100). This same witness testifies that prior to 1872 the pastures had not been fenced but after the fences were constructed "the Company rounded up the cattle that did not belong to them and turned them on the outside" (Trans., p. 101). The witness did a great deal of that work under the direction of Mr. Coleman, and he says that

"from that time (i. e., 1872) on I have never heard of any cattle being permitted to range or pasture in that pasture there. So far as my knowledge goes, Coleman, Mathis & Fulton, and Coleman & Fulton, and the Coleman-Fulton Pasture Company are the only ones who have ever controlled that pasture."

A witness, R. C. Rachal, who was 74 years old and had lived in San Patricio County for 48 years, said he remembered when the fences were first built and said that the Company used "the Big Pasture" for stock, and that no one else was permitted to run their stock in there after the fences had been constructed. He adds:

"Coleman, Mathis & Fulton exercise control over it. Tom Coleman was the man in charge and their control was exclusive. That control was exclusive and has continued from one to the other up to the present time" (Trans., p. 102).

This witness was also familiar with the Pistola Mill, the pens, the wind-mill, the cistern, the roadway and the gate coming through from San Patricio to Rockport. He knew the Mexican who live at the Pistola Mill (Trans., pp. 102, 103).

The witness, R. K. Reed, testified that the big pasture

"was entirely fenced so that cattle could not get in nor out. The Coleman, Mathis & Fulton Company's cattle grazed on that pasture. No one else's cattle were permitted to go in there" (Trans., p. 102).

This witness worked for the Company on and off about 14 years, from 1878 until 1900 or 1901 (Trans., p. 104). He remembers Mexicans working for the Coleman-Fulton Pasture Company and living upon the property in question. They raised crops upon it. The house and pens were kept in

repair while he was there (Trans., p. 104). He had charge of the Picatche Pasture for 14 years, and cared for the fence, and during that time he says :

" I had this Pistola wind-mill to look after and had to go there pretty often from 1886 to 1900. * * * Sometimes I would be there ; sometimes it would be a week and sometimes it would be two or three days and sometimes I would not be there for two weeks " (Trans., p. 105).

Juan Cruz testified that he lived in the little house at the Pistola Mill from 1874 to 1878, and attended to the pasture and watched the fence and the horses. He says :

" There were pens there at that time for the cattle ; also horse pens. At that time there was no field there ; there was a well there. * * * The Company used those pens when they were gathering cattle and possibly branding ; used by the Company for cattle and stock. The Company used those pens all the year, every week or two " (Trans., p. 105).

Juan Flores testifies substantially to the same effect (Trans., p. 106). His testimony, however, covers a longer period, he having worked upon the ground from 1884 to 1896 and at intervals ever since (Trans., p. 106).

The witness Joe Tumlinson began to work for the Coleman-Fulton Pasture Company in 1900 (Trans., p. 106), and was familiar with the land at the Pistola Mill. He confirms the testimony above referred to and says that the Pistola Mill was a " headquarters camp between those two pastures " (Trans., p. 107). The pens were used up to the time the land was sold to George H. Paul, and were torn down three or four years ago (Trans., p. 107). That was in 1908 (Trans., p. 108). See also the testimony of Joseph F. Green, (Trans., p. 110), which is substantially to the same effect. Speaking of the Sam Houston Survey, he said :

" We have used it all the time until we sold it and they fenced it up and have not allowed anybody else to use it and nobody else has wanted to use it " (Trans., p. 119).

James B. Wella, who is a lawyer, stated that he has been acquainted with the property of the Coleman-Fulton Pasture Company from 1870 or 1871, about the time when Coleman, Mathis & Fulton commenced buying up the property and making a ranch (Trans., p. 115). He remembers the building of the fences in 1872. He testifies as follows, viz.:

"After these fences were put up that was the first big pasture built in that country, and all the people, including my father who had a large stock of cattle running on the ranch and we got word among other stockmen whose cattle ranged over that country, to be there at the Cassau Ranch on the Chiltipin, that Coleman, Mathis & Fulton had completed their pasture and were putting out all of the cattle except their own, and to be there and receive such cattle as the different owners might have, and they had a representative there, I know that everybody's cattle were then taken out, except the Coleman, Mathis & Fulton. From that time on down I don't think anyone besides Coleman, Mathis & Fulton and their successors have used this pasture" (Trans., p. 115).

This witness also remembers the improvements above referred to at the old Pistola Mill.

The Evidence as to the Payment of Taxes.

The testimony further shows that the petitioners and their predecessors in the title have paid taxes continuously upon the property claimed by them from 1872.

James C. Fulton was in the employ of Coleman, Mathis & Fulton from 1872 to 1880 (Trans., p. 93). He attended to the payment of taxes for the firm and paid all of the taxes accruing on the Sam Houston Survey (Trans., p. 94), which were never delinquent but were paid as they accrued. From 1880 he worked for Coleman and Fulton and Coleman-Fulton Pasture Company till 1902, and he testified that never between 1880 and 1902, were any taxes allowed to become delinquent (Trans., p. 94).

A statement and original receipts, showing that taxes had been paid on the Sam Houston Survey beginning with the year 1889 down to and including the year 1908, were offered in evidence, and it was admitted by all counsel that they were correct and showed taxes to have been paid in each year by Coleman-Fulton Pasture Company before they became delinquent (Trans., pp. 117, 118). It was also shown that the taxes on the property owned by the Coleman-Fulton Pasture Company, after the sales of small farms in 1908, had been paid by that Company for the years from 1909 down to and including the year 1914 (Trans., p. 117). These taxes were on about 153 acres (Trans., p. 152). (The map shows 153.64 acres more or less.) Taxes were paid upon the property of Widergren, Sivers and Pullin (Trans., pp. 113, 114).

In connection with the foregoing testimony it should be noted that the present suit was filed on May 30, 1914.

The above statement of the facts will enable us to consider whether or not there was peaceable and adverse possession within the meaning of Articles 5680 and 5681, sufficient to render applicable either the ten-year or the five-year statute of limitations.

Under the law of Texas the grazing of cattle over land does not constitute possession within the meaning of the statutes of limitations, unless accompanied by proof of a sufficient enclosure or of some other act of dominion. It was on the specific ground that there was no proof of such enclosure that this case was decided against the plaintiffs in error both

NOTE.—There does not seem to be proof that the taxes on the two plots of W. J. Gibson for 280 acres, and the Alice State Bank for 160 acres, were paid after 1908. The title to the Gibson property, however, was found by the court to have been acquired by adverse possession. The only now relevant thing lacking respecting taxes, therefore, is proof as to the payment of taxes for 1909 to 1914 on the Alice State Bank plot.

by the trial court and by the Circuit Court of Appeals, and the controversy is thus reduced to the question whether Nueces Bay was such a barrier as to constitute an enclosure for the purposes of the statutes of limitation.

The easterly two-thirds of the Houston survey, which is the only part of that survey as to which controversy now survives, was enclosed in the Picatche Pasture (Ex. B); that pasture was, roughly speaking, twelve miles in length from Nueces Bay to Chiltipin Creek; it was between six and seven miles in width east and west. On the west the pasture was bounded by the Pistola fence, erected in 1872, and standing at the date of trial, on the north by the Chiltipin fence, erected in 1872, which, although abandoned from the Thomas Coleman ranch eastward at a later date, was kept up along the whole northerly boundary of the Picatche Pasture certainly until the time of trial. On the east the boundary was the Doyle Waterhole fence, erected not later than 1882 and kept up down to the date of trial except as the laying out and fencing of small farms rendered it necessary to tear it down in parts, the remaining parts being connected with the farm fences. On the south there was no fence, as the tract was there bounded by Nueces Bay. The Pistola fence and the Waterhole fence were practically parallel to each other, and were carried out into the bay to a point where cattle could not cross without swimming. The bay was not less than six feet deep, and as a matter of fact cattle did not cross the bay or go around the fences: For all practical purposes they were adequate barriers.

The trial judge stated in his opinion as one of the controlling facts of the case that "in this case there is water boundary of fourteen miles": The fact is, or at least there was ample evidence from which the jury might have found, that for the period from 1881-1882, or, as we claim, from 1878, down to the time of trial, the only unfenced water front was about seven miles. The Court was probably misled by the

fact that the Chiltipin fence does not appear on Exhibit B, and possibly by the testimony of the witness Green (p. 112, fol. 173) that "The entire water front of the company's properties is about fourteen miles." But the company's properties of which Green was speaking embraced large tracts to the east of the Doyle Waterhole fence which were bounded by Copano Bay, Puerta Bay and Corpus Christi Bay.

Nueces Bay Constituted a Sufficient Barrier to Satisfy the Requirements of the Texas Statute of Limitations.

It is a generally recognized rule that for the purposes of statutes of limitation an enclosure may consist in part of natural boundaries, such as rivers or other bodies of water :

Sanders vs. Riedinger, 30 App. Div. (N. Y.), 277
Affd., 164 N. Y., 564.

Jackson vs. Halstead, 5 Cowen (N. Y.), 216.

Olithero vs. Fenner, 122 Wis., 356.

Doniphan Lumber Co. vs. Case, 87 Ark., 168.

Brumagim vs. Bradshaw, 39 Cal., 24.

Goodwin vs. McCabe, 75 Cal., 584.

Illinois Steel Co. vs. Bilot, 109 Wis., 418.

Thomas vs. United States (136 Fed., 159), was a criminal prosecution for enclosing public lands in violation of the Act of February 25, 1885, entitled "An Act to prevent unlawful occupancy of the public lands". It was claimed by the defense, among other things, that because the tract was bounded for two or three miles by a lake which was unfenced there was no enclosure. The Court said (p. 161) :

"In other words, the appellant took advantage of Big Lake to make it a part of his enclosure, and now claims the benefit of the fact that when the waters of the lake recede, as they do in the late summer or early fall, cattle can go around the ends of his fences, which extend into the lake, and may thereby enter the enclosure. * * * Nor can the appellant maintain

that his enclosure is not completed, by showing that by the 1st of September in each year cattle may, if they possess sufficient intelligence or are driven there, go around the ends of the fences which extend into the lake. There is no evidence that cattle or stock of any kind ever entered the enclosure through these so-called openings. The whole contention that there are openings in the enclosure, and that therefore the appellant is not amenable to the law, is so plainly without merit as to require no further discussion."

This doctrine is accepted and approved by the Courts of the State of Texas :

Dunn vs. Taylor, 94 S. W., 347 ; 107 S. W., 952 ;
113 S. W., 265 ; 102 Tex., 80.

Loring vs. Jackson, 95 S. W., 19.

Frazer vs. Seureau, 128 S. W., 649.

Randolph vs. Lewis, 163 S. W., 647.

Polk vs. Beaumont Pasture Co., 64 S. W., 58.

Vineyard vs. Brundrett, 42 S. W., 232.

The validity of the general proposition was not denied by the trial court or by the Circuit Court of Appeals. But the case was decided below on the theory that on the facts of this particular case the water boundary was not adequate for the purposes of the statute (Trans., pp. 54, 169). The decision was rested squarely upon the supposedly controlling authority of Hyde vs. McFadden.

Hyde vs. McFadden was decided by applying to its facts the principle of the decision in Beaumont Pasture Company case. The court concluded "that an enclosure of the character here shown does not meet the requirements of the statute as to adverse possession" (p. 442), but gave no reasons for the conclusion further than to say that the facts "while differing somewhat in their minutiae are substantially the same in their controlling features as those which appear in the case of Polk vs. Beaumont Pasture Co."

The tracts of land which were under discussion in the Hyde and Beaumont cases adjoined each other. We

annex to this brief a copy of a map showing both tracts, which was offered in evidence in *Hyde vs. McFadden* and will be found at page 617 of the record in that case on appeal to the United States Circuit Court of Appeals for the Fifth Circuit. It appears from the testimony that this map is incorrect in certain details none of which, however, is material in the present discussion, except that Rodair Bayou, not shown on the map, ran into Taylor's Bayou and formed the boundary from the end of the fence G-H to the end of the red line fence. The title which was in question was that of the tract marked on the map "D. A. Cunningham."

It is not to be forgotten that *Hyde vs. McFadden* was not tried before a jury and that, therefore, the question whether the evidence as to adverse possession was sufficient under the rule in the *Beaumont Pasture Company* case to justify submission to a jury, did not arise.

Facts in the Hyde vs. McFadden and Polk vs. Beaumont Pasture Company.

The tract in question in *Hyde vs. McFadden* was patented to D. A. Cunningham. Under date of June 10, 1836, Andrew P. Cunningham, as attorney for D. A., conveyed the tract to J. B. Hyde and P. J. Glieses, copartners composing the firm of Hyde & Glieses, residing and doing business in New Orleans. Complainants were the heirs of J. B. Hyde. Subsequently this firm and the individual partners were adjudged bankrupt by the United States Court sitting in New Orleans, and in 1843 Richard Brennan, as assignee in bankruptcy of the estate of Glieses, individually and as a member of the firm, executed a deed by which he undertook to convey all of the interest of the firm of Hyde & Glieses in this tract to T. B. Hyde. In 1882, T. B. Hyde having died, his wife and heirs conveyed to T. J. Chaison and J. M. Hebert. About 1884 the defendant W. P. H. McFadden, who at that time claimed to own the tract marked on the map "P. H. Humphrey", and parts of adjoining tracts, built the yellow line fence J-L-M-N, enclosing what is called in the case the "small pasture". It will be observed

that this fence was run so as to include a part of the Cunningham tract. In 1885 Chaison and Hebert conveyed to McFadden all that part of the Cunningham tract which lay in this small pasture. In 1896, by deed of partition between Chaison and Hebert, the rest of the Cunningham tract was set off in severalty to Chaison.

At the time of the adjudication in bankruptcy against Hyde and Gliesses, Texas was a republic and therefore the bankruptcy proceedings and the conveyance by the assignee in bankruptcy were a nullity so far as title to Texas lands is concerned.

About 1900 the complainants gave a power of attorney to one Toler. Acting under this power of attorney he made a conveyance of the whole Cunningham tract to W. P. H. McFadden. The suit was brought for the purpose of having this conveyance annulled, on the ground of fraud, and lack of authority on the part of Toler, and also for the purpose of having a decree declaring the complainants to be the owners of an undivided one-half of the whole Cunningham tract. The defendants were McFadden and associates for whom he had acted; the heirs of Chaison; and also the heirs of Cunningham, who, it seems, set up some shadowy claim that the deed by Andrew P. Cunningham was invalid. McFadden and his associates set up, among other things, the defense of limitations as to the part of the tract enclosed in the small pasture. The Chaison defendants set up, among other things, the defense of limitations as to the rest of the tract.

The trial court held that it was within Toler's power to execute, as attorney for the complainants, the deed to McFadden, and that there had been no fraud. This, of course, disposed of the whole case and rendered immaterial any question of limitations. On appeal the Circuit Court of Appeals held, however, that the deed should be declared void; that as to the part of the tract which was enclosed in the small pasture title of McFadden and his associates was good by adverse possession; that as to the balance of the tract there was no title in defendants by adverse possession, and complainants should recover.

The facts as to possession were that in 1882 there were standing the blue line fence D-E-F, built by Hillebrandt to fence off an enclosure within which he lived; the blue line fence G-H, built by Hebert to fence off an enclosure within which he lived; the red line fence

built by Beaumont Pasture Company, claimant of the land adjoining on the east. About 1883 Chaison and Hebert built the blue line fence A-B-C, and from that time on for many years pastured cattle within the enclosure thus formed.

It is to be noted, however, particularly, that it clearly appeared that neither at the time that the fence A-B-C was built nor afterward did Chaison and Hebert claim to own all of the land within that enclosure; that as matter of fact they claimed to own only scattered parcels; that there were living, and continued to live, within the enclosure thus formed, five or six persons each living upon land claimed by him as his own and whose claim Chaison and Hebert did not dispute; that some of these people co-operated with Chaison and Hebert in building the fence A-B-C; and that not only Chaison and Hebert but all of the persons so living within the enclosure used the enclosure for the pasturing of their cattle and horses as their convenience required. It was in evidence also that some of the persons owning land and living within the enclosure consented to the enclosure, and that at least one of them was not consulted. There was some testimony to the effect that the bogs or marshes at the ends of the fences at A, N and K could be passed by cattle: The preponderance of testimony, however, was that they could not be so passed except under exceptional circumstances. There was some testimony that the bayou between C and D could only be crossed by cattle under exceptional circumstances, but there was a preponderance of testimony that it was only under exceptional circumstances that that bayou could not be crossed by cattle.

In *Polk vs. Beaumont Pasture Company* the tract in dispute was all that part of the Carroll League (see map) which lay east, of the fence H-J-K. It appears from the report that this fence was about eight and a half miles long; that it commenced at the edge of a marsh on the south side of the Neches River and ran to the Rodair Bayou; that it was the only artificial barrier; that the remaining boundaries were Rodair Bayou, Taylor's Bayou, Sabine Lake and Neches River to a point opposite the fence, and then about a mile and a half or two miles of marsh to the end of the fence; that the length of the natural barriers was about forty to fifty miles; that they were sufficient to prevent the

passage of stock into and out of the pasture; that the marsh between the end of the fence and the Neches River was an impassable bog; that when the fence was built in 1878 there were inside the enclosure about seventeen or eighteen families nearly all of whom owned tracts of their own, their holdings varying from seventy-five to several hundred acres; that most of them had little herds of cattle varying in size from fifteen to fifty or sixty head; that the Beaumont Pasture Company when it erected the fence told most of the holders that it did not intend to disturb them, and that further than that there was no agreement or common purpose. Subsequent to the enclosure persons, strangers to the Beaumont Pasture Company, bought land and moved in while others who had lived inside sold out to independent parties, all without any sort of consent or understanding with the Beaumont Pasture Company. The independent holders agreed to no terms or restrictions and had nothing to do with making or maintaining any enclosure except their own enclosures along their separate tracts inside the large pasture. The large pasture embraced about fifty thousand acres. In 1878 the Beaumont Pasture Company owned about twenty-eight thousand acres of this, but by 1887 had increased its holdings by purchase to about forty-eight thousand acres. Within the enclosure there was a community consisting of about fifteen families near Grigsby's Bluff, and there there was a post office and school house. A public road leading from Beaumont to Sabine Pass ran through the enclosure without crossing any barriers on the south except Taylor's Bayou.

The facts respecting the enclosure of the so-called small pasture referred to in *Hyde vs. McFadden* given above are also repeated in the report of the Beaumont Pasture Company case.

The land in controversy was not actually occupied until May, 1896, at which time Beaumont Pasture Company placed a tenant thereon and continuously occupied the same by tenant to 1899. In 1878 some improvements were put on the pasture by the company, but none of them reached nearer than one and a half miles

to the land at suit. In 1895 the company sold out all of its holdings except a few small tracts. It retained the tract in suit.

Discussion of the Decisions in Hyde vs. McFadden and the Beaumont Pasture Company Case.

In the Beaumont Pasture Company case, the Court, after stating the facts, at the very beginning of its opinion, said :

" If appellees had enclosed the entire pasture by artificial barriers, it may well be doubted whether the dominion and control shown by the evidence to have been exercised by them over said enclosure would be sufficient to establish such exclusive possession and control of said pasture as would render appellees' possession of the land situated therein 'adverse possession,' as that term is used and defined in the statute. But conceding, for the sake of argument, that the evidence is sufficient on this phase of the question, we are of opinion that it wholly fails to establish one of the essential elements of adverse possession, in that it fails to show a visible appropriation of the land."

The Court then proceeds to the discussion

" whether or not the facts in this case show such actual possession by the appellees (Beaumont Pasture Company) of the 587½ acres of land in controversy as will support their plea of limitation. The adverse possession of land sufficient to support the statute of limitation must be actual and visible, and must indicate clearly an assertion of claim of ownership in the occupant. In order to obtain such possession, the occupant must enclose the land or a portion of it, or put such improvements thereon as will give notice to the owner of such adverse possession. Where an enclosure of the land is relied on to show such adverse possession, such enclosure may be made partly by the use of natural barriers, but in such case the natural barriers must be so used in connection with artificial barriers as to indicate that they are relied on to enclose the land and keep out persons desiring access thereto. *More than five-sixths of the barriers enclosing the large pasture in which the land in controversy in this suit is situated are natural barriers, consisting*

of bayous, lake, river, and marsh. The owner of the land crossing Sabine Lake from the southeast and entering said enclosure, would find no barrier between said lake and the land in question, nor, if he followed the shore of the said lake for its entire length would he find any artificial barrier connected with the lake which would indicate that said lake was relied on a barrier to enclose his land. The same condition would exist if he entered said pasture by crossing Taylor's Bayou or the Neches River. If he entered on the public road leading from Beaumont to Sabine Pass he would first enter the small pasture of six thousand acres and pass out of that into the large enclosure with nothing to indicate to him that the fence on the north of the large enclosure was not the southern barrier of the small pasture, or was relied on in any way to enclose the land in question. We cannot believe that an enclosure of this character meets the requirements of the statute as to adverse possession. *Vineyard vs. Brundrett* (Tex. Civ. Ap.) 42 S. W., 233; *Brumagim vs. Bradshaw*, 39 Cal., 24. To constitute such possession, there must be in the language of the statute, an actual and visible appropriation of the land and no such appropriation of the land in question is shown for a period sufficient to sustain appellees' plea of limitation of ten or five years, and they show no such title or color of title as would entitle them to prescribe under the three-year statute."

In *Hyde vs. McFaddin*, the shape of the enclosed tract was radically different. It was claimed that the fence enclosure was more than double the water boundaries in length, but none of the boundaries were as continuous or of such a marked and exclusive character as in the Beaumont Pasture case or in the case at bar. On the east there was a fence reaching from Rodair Bayou to Taylor's Bayou, and from Rodair's Bayou north; on the south and west the fences reached Hildebrandt's Bayou at three points. While there was testimony, which was absent in the Beaumont Pasture case, that the fence A-B-C ran to the river bank, it was the fact that one might cross over a large part, though not all, of the boundaries, and go to the Cunningham tract, without meeting a barrier.

It is indicated, therefore, that it was not the foregoing features, but others in which there was closer

and more substantial similarity between the facts in *Hyde vs. McFaddin* and those in the *Beaumont Pasture* case that the Court had in mind in the brief decision in the former case. These were that in both cases the fences were built with strict regard to topography, and in absolute disregard of property lines, for the primary and immediate purpose of making with a minimum of labor an enclosure which would retain cattle with fair security, and not for the secondary purpose of asserting and evidencing a claim of ownership to the whole of the enclosed tract; that in both cases the enclosure embraced considerable tracts to which the encloser made and intended to make no claim, but which were owned and occupied, not by permission, but as of right, by persons not in privity with the encloser, and that in both cases while the encloser kept the largest, and indeed the only large herds, the other occupants used the whole enclosure freely for such cattle and horses as they had. In short, in each case it would have been impossible for one judging by the character of the user alone to point out any acre of unimproved land within the enclosure as being used under any other or different sanction than that existing with reference to any other acre, or to distinguish what was used under claim of title from that which was simply used for casual convenience.

It would seem obvious under such circumstances as these that as the conditions and uses inside the enclosure became weaker as proof of appropriation under claim of title, the necessity for showing that the external barriers were sufficient naturally increased in rigor; and that the external barriers which were relied upon and which might otherwise have amounted to a visible assertion of a claim of title to the enclosed land, to a large extent lost their significance, since people not in privity with the encloser used the enclosed lands in like manner and as of equal right with him.

It is true that in *Polk vs. Beaumont Pasture Company* the court discusses, and in form rests its decision upon the inadequacy of the barriers, as a distinct

proposition; but it is at pains to state the facts respecting user, occupancy and claim of title at length and with particularity, and it speaks significantly when it says that even if the barriers were otherwise adequate it would be doubtful that the possession was such as the statute requires.

It is true that the reasoning respecting barriers would apply, and it may very well be that the decision would have been the same, had Beaumont Pasture Company had exclusive use of and claimed title to every part of the land enclosed; but it seems to us nevertheless that it is by no means fanciful to say that *Polk vs. Beaumont Pasture Company* is to be regarded as authority only for the proposition that where an enclosure is of itself equivocal, and includes tracts which are not owned or claimed by the encloser, but are owned and some of them occupied by persons not in privity with him, and there is nothing in the character of the user to identify those tracts which the encloser claims and to distinguish them from those tracts which he does not claim, the enclosure does not meet the requirements of the statute. It is only in that sense that the decision was perfectly or even closely adaptable to the facts in *Hyde vs. McFadden*, and the language of the opinion in that case does not indicate that the Court regarded the decision in *Polk vs. Beaumont Pasture Company* as authority for any broader proposition.

We think, therefore, that in *Hyde vs. McFadden* it was the intent of the court to decide that on all of the facts, those respecting user, occupancy and claim of title, as well as, and in interrelation with, those respecting barriers, there was nothing to indicate to the observer that Chaison and Hebert laid any claim to, or intended a hostile appropriation of, the Cunningham tract.

Even if we are wrong in this, there is still a radical distinction between *Hyde vs. McFadden* and *Polk vs. Beaumont Pasture Company* on the one hand, and the case at bar on the other. But before passing to that we will examine the case of *Vineyard vs. Brundrett*, 42

S. W., Rep., 232, on the authority of which *Polk vs. Beaumont Pasture Company* was in part decided.

Vineyard vs. Brundrett Considered.

In *Vineyard vs. Brundrett*, the facts are summarized in the following extract from the decision of the Court (p. 232) :

"The land known as the 'Lamar Property' is a peninsula which is bounded on the west by Copano Bay, on the east by St. Charles Bay, and on the south by the Bay of Aransas, these bays being waters or arms of the Gulf of Mexico; and the property in controversy is on the south end of the peninsula, and is bounded by the shores of the above-mentioned bays on the west, south, and for the most of the distance on the east. On the north and for a part of the distance on the east it is bounded by lands of the same property claimed by another party."

It also appears that the defendant had put no improvements on the lands and had not occupied them except to pasture his cattle on them. The Court held that the grazing of cattle was not alone sufficient evidence of adverse use to support the statute of limitations, but that the adverse holding must depend upon the sufficiency of the enclosure. It then proceeded as follows :

"The only artificial barriers against access to the land were the fences built first by Herring and Little, and rebuilt by O'Connor, to fence in and inclose other land to the north of the land in controversy, with no intention to inclose the latter. There was no change in the fences, or any hostile or open assertion of exclusive possession in inclosing the land that would apprise the owner that an adverse claim was being asserted thereto. There was only an agreement to keep in repair fences built to inclose other land. By far the greater part of the boundaries were the shores of the bay, with nothing to indicate that they were relied on or used to inclose the land, and keep out any person desiring access thereto. The inclosure was not such as to show the assertion by any one of a claim hostile to the true owner, nor, indeed, such as to give evidence that the land was in fact designedly inclosed. The bay shores were natural barriers, and the only

artificial barriers erected were the fences built to inclose land on the other side of them, with nothing to indicate that they were being used to inclose the land in controversy. To give effect to the fences and bay shores as an inclosure of the land, there must have been acts distinctly indicating that they were relied on as such. The artificial barriers must be sufficient to notify the public that the land is appropriated (*Brumagim v. Bradshaw*, 39 Cal., 24). When we take into consideration the extent of the bay shores, the size of the tract, *the inclosure of others, and the facts that the fences were made to inclose other lands than those in controversy, and that the defendant did not claim title to all the land within the barriers relied on to form the inclosure*, the evidence is clearly insufficient to show a possession to support the bar of five years' limitation."

Thus it appears that the defendants merely pastured their cattle upon the land in question, availed themselves of the fence which they found in existence, bore part of the expense of repairing it, so that their cattle would not escape, and occupied the land enclosed by the shores of the bays and fence in question, without doing anything else to indicate that there was an intention to occupy the land adversely to other claimants. Indeed, the record in the case shows that on a part of the land a town had been plotted off on the south end of the peninsula, although it had never been occupied. What has been said above concerning the decision in *Polk vs. Beaumont Pasture Company*, to show that its principle does not apply to the facts in the case are in the main applicable to the decision in the *Vineyard* case, and need not be repeated. Clearly the facts of the case were radically different from those in the case at bar not alone so far as they relate to the claim of title, but also so far as the character and purpose of the enclosures were concerned.

Finally, as in *Hyde vs. McFadden*, the case seems to have been tried before the court without a jury. It does not necessarily follow, therefore, that if there had been a jury trial the court would not have held that there was evidence sufficient to justify its submission to the jury upon the question whether or not a claim of adverse possession might have been inferred.

The Difference in the Facts in the Case at Bar from those in the Hyde, Polk and Vineyard Cases.

It will be seen that these three cases, on whose authority the case at bar has been decided, differed in their facts radically from those shown by the record herein. The only point of similarity is that in all of them it would have been possible for a man to land on the water front and go about with considerable freedom without discovering the fences; but while in the Hyde, Polk and Vineyard cases one might traverse the land through and through in many directions without meeting an artificial barrier, in the case at bar no one could cross the Picatche Pasture in any direction without having his progress barred by a fence. That pasture was not a peninsula substantially unfenced except at the neck: It was a rectangular tract fenced on three sides, with the side fences carried out into the water. No one exploring the whole tract could possibly go away with a vestige of doubt of the intent to enclose and to appropriate. If the tract had been half a mile long by a quarter of a mile broad instead of twelve miles by seven, it would never have entered the mind of any man to doubt that the water front was an adequate barrier; and we think that in the last analysis this litigation must have been decided against us simply because the dimensions of the tract enclosed were so large that from a large part of the water front the side fences were, perhaps, not in sight. That reduces to the flat proposition that, arbitrarily and irrespective of any other circumstance, a water boundary seven miles in length cannot for the purposes of a statute of limitation be a barrier to complete an enclosure. We think that this Court will not be sympathetic with such a view.

As a general proposition the test of sufficiency of possession is that the facts relied on as constituting it must be such as to challenge the attention of the true owner to the fact that

his rights are disputed and his land appropriated. But that does not mean that all of the facts which concur in any given case to constitute the possession and evidence of appropriation must be simultaneously apparent from all and every part of the land, nor yet that each of those facts must in itself be such as to carry home notice to the stupid or incurious man. It is sufficient if the facts are such that a man reasonably astute to protect his own rights would discover their hostile invasion. The true owner cannot escape the operation of the statutes by closing his eyes to what is reasonably obvious, nor yet by resting upon the isolated significance of the particular facts which he can see from where he happens to stand.

In the present case the facts respecting the use of the Pitcathe pasture were such that the intent to enclose and exclusively appropriate must have been obvious. Large herds of cattle were constantly grazing upon the pasture; there were windmills scattered in different parts of it, indicating not a mere chance grazing but permanent occupation; the employees of Coleman, Mathis & Fulton and their successors were constantly at work in and going about the pasture; one of the principal public roads of the vicinity ran through the pasture, cutting its east and west fences, and there were gates on the road in each fence; on the Houston survey itself there were cattle pens, horse corrals and other structures, and for a period of over twenty years it was constantly used, according to the ordinary requirements of the cattle business, as a headquarters camp. It is hardly probable that any man could live in the neighborhood without knowing of the appropriation, fencing and user of this land; and even a stranger to the country could not land on the water boundary and penetrate the pasture for any considerable distance without discovering a multitude of indications of use and appropriation.

It would seem, therefore, that on all of the facts of this particular case the element of magnitude of the water

boundary is of no importance to the vital question whether the possession and enclosure were such as to give to the public notice of appropriation and possession.

The Weight of Authority in Texas Supports Our Contention.

We need not rest on abstract reasoning our contention that the facts in this case constitute possession for all of the purposes of the statutes of limitation. It is the law of Texas, settled by judicial authority of the courts of that state, that they did constitute such a possession.

The case of *Dunn vs. Taylor* went twice to the Court of Civil Appeals and finally to the Supreme Court of Texas. It is reported in 94 S. W., 347 and 107 S. W., 952; and in the Supreme Court in 102 Tex., 80 and 113 S. W., 265.

The tract of land involved in that case was enclosed on three sides by fences and the fourth by Nueces River. It appears from a statement in the report of the case in 107 S. W. that the river frontage was six or seven miles. On the first trial the Court took the question of adverse possession away from the jury and directed a verdict on that issue. On the first appeal the Court of Civil Appeals held that the fact that there was such an extended water boundary not protected by fences was not conclusive, but that the Court of Civil Appeals was not in a position to render judgment on the evidence because it had not been passed upon by the jury but had been withdrawn from them by the trial court. On the second appeal to the Court of Appeals the Court said:

"If it was the custom of people having enclosures along the Nueces River to use it as a barrier on that side, that would be a circumstance tending to show that if appellees had their land fenced on all sides, except along the river, they were holding it adversely to the world. If it was the general custom to regard the river as a barrier, it tended not only to show that it did form a barrier, but an adverse holding of the land. If there

had been proof of no such custom in that county, experience would put any person of ordinary sense and discretion upon notice that if persons were fencing parcels of land on all sides but that of a contiguous stream, they were depending upon a stream to form the other side of the enclosure and would give notice of adverse claims to the land."

The Court then discussed the question of adverse possession as being proven without conclusive evidence of its enclosure, and said :

" We have discussed the foregoing questions and cited authorities thereon, not because we doubt that the Nueces River, together with the fences running to it, formed such an enclosure as evidenced possession and clearly defined the boundaries of the land claimed. The fact that there were times when cattle might have escaped by crossing the river which was standing in pools would not have the effect of keeping the enclosure from showing possession. Where an enclosure consists partly of fences and partly of natural obstructions, such as rivers, mountains or cliffs, it is the province of the jury to pass upon the question whether, taking into consideration the quantity, locality, and character of the land, the artificial barriers, with the natural ones, were sufficient to notify the public that the land was appropriated, and to make such appropriation a notorious indication of ownership."

The Court then considers the decisions in *Vineyard vs. Brundrett*, and *Polk vs. Beaumont Pasture Company*, and says :

" A review of those cases will, we think, demonstrate that neither of the opinions will sustain the contention," viz. : " that a river which at times becomes passable for cattle cannot form such a barrier as taken with the fences, would form an inclosure."

After quoting from the opinion in *Vineyard vs. Brundrett* case, the Court says (p. 956) :

" That opinion sustains our position in this case, which is that the fences being built to the river, gaps going down to the river being obstructed, and holes dug in the river to prevent passage, and the land being occupied by persons living in houses, there was notice to all persons that the land was being held adversely."

The Court then proceeds, referring to the decision in *Polk vs. Beaumont Pasture Company*, in language which is peculiarly applicable to the facts in the case at bar, as follows, viz. :

"That case sustains the position of this court. No one could fail to be informed by the fact that *lines of fences, one running parallel with and the others at right angles to a river, and connecting with the parallel line*, that the land around which the fences and river run were intended as an enclosure of the land, and when, in addition, gaps in the steep banks of the river are obstructed and cattle are being grazed on the land, notice is given that possession is distinct and hostile" (p. 956).

Dunn vs. Taylor was appealed to the Supreme Court of Texas and was there reversed upon the ground that the possession had not been shown to be sufficiently continuous (113 S. W. Rep., p. 265), but the Court agreed with the Court below (p. 268)

"that the inclosure by the fence and the river was sufficient, when the land was in actual use, to show such an appropriation of it as would sustain the defense of limitation if such use was continuous."

Loring vs. Jackson, Texas Civil Appeals, 95 S. W., 19, involved a tract of 640 acres, which was enclosed with other lands to form a pasture of about 26,000 acres. The enclosure consisted of fences along the southern and western boundaries, and of water barriers only, on the north, east and southeast. There were about twelve miles of fence and from fifteen to twenty miles of water barrier. Herds of cattle ranging from 3,000 to 5,000 head were pastured on the tract, and for five years there was maintained on the premises a house, which was used to camp in and hunt from, and in connection with the rounding up and care of cattle. Both the five-year and ten-year statutes were pleaded. The Court held that the facts were entirely different from those in *Polk vs. Beaumont Pasture Company* and *Vineyard vs. Brundrett*. The Court said :

"It is true that the appellant, entering this enclosed pasture from the water side would have encoun-

tered no obstruction of any kind in getting to the land claimed by her ; but this would be the case with every enclosure fenced to any considerable extent by a water barrier. Such enclosure, however, would be sufficient as a basis for the statute of limitations, 'if the natural barriers are so used in connection with the artificial barriers as to indicate that they are relied upon to enclose the land and keep out other persons desiring access thereto.' "

The Court pointed out that the fence was erected by the claimant for the purpose of enclosing the land and taking exclusive possession ; that while of no value in itself it was of some force in connection with the circumstances of the enclosure that the appellees' cattle were kept in the pasture and no other cattle allowed therein, and that for " a greater portion, if not all ", of the time there was a small house on the land used occasionally by persons caring for the cattle, and the Court concluded that

" the facts constitute such notorious adverse possession, use, and occupation of the land as to bar appellants' claim under the statute of limitations "

both under the five-year and the ten-year statute.

In *Alley vs. Bailey*, Texas Civil Appeals, 47 S. W., 821, the facts except in minor particulars were quite similar to those in the case at bar. The application of the five year statute of limitation was involved. It was held that where one of four sides bounded on a river, that was sufficient to constitute a barrier. The exact extent of river boundary does not appear, but it is stated that the entire enclosure contained 8,000 acres.

In *Frazer vs. Seurean*, 128 S. W., 649, the Texas Court of Civil Appeals, on the question of enclosures, said :

" But the evidence shows that three sides of it were inclosed and the fourth side abutted on Buffalo bayou, and that the entire tract was used by Phelps as a pasture for his cattle. This might itself be sufficient, if inclosure were essential, to show that the land was inclosed."

The court further held that the facts stated in the foregoing extract were sufficient to charge a person claiming adversely with knowledge of the fact that a person in possession through a tenant claimed title to "all the land within such boundaries, whether the bayou was such a barrier as would be considered a fence or not."

Randolph vs. Lewis, 163 S. W., 647, the latest Texas case upon the subject, was decided in 1914 by the Court of Civil Appeals of Texas. It was held in that case, on the authority of Frazer vs. Seureau and Dunn vs. Taylor, that the fact that one side of a tract of land to which defendant in trespass to try title claimed title under the five-year statute of limitation, was not fenced, but was bounded by a river, could not defeat defendant's claim.

Brumagim vs. Bradshaw, 39 Cal., 24, a leading case, is valuable for the exhaustive discussion in the opinion of the court. The case is cited on the general principle in all the Texas decisions to which we have referred above.

The land in question in the Brumagim case was bounded on one side by an ancient wall or ditch which had become dilapidated but was repaired by the persons claiming title to the property, so that it was sufficient to turn cattle. Other barriers of the enclosure were creeks and a bay. A small corral and a shanty for herding cattle was maintained and horses were pastured within the enclosure.

The court said :

" We have carefully considered the able and ingenious argument of the defendants' counsel, to the effect that the tidewaters of the bay, with a beach in front of them, on which the public was free to land, and to use for any legitimate purpose, would not constitute a sufficient barrier on that side to form a portion of a complete inclosure, in a legal sense. But we think their proposition is not tenable. *If it were, the result would be that a tract of land, completely inclosed with a substantial fence on three of its sides, and with the fourth side fronting on the ocean, could not be held to be inclosed ; or that an island in the ocean could not be*

deemed to be sufficiently inclosed, unless it had precipitous cliffs, or some sufficient artificial inclosure all around it. *A proposition cannot be sound, which necessarily leads to such absurd results."*

What the court says about the propriety of submitting the facts to a jury is peculiarly applicable to the facts in the case at bar, viz. :

"The general principle pervading all this class of cases, where the inclosure consists wholly or partially of natural barriers, is, that the acts of dominion and ownership which establish a *possessio pedis* must correspond, in a reasonable degree, with the size of the tract, its condition and appropriate use, and must be such as usually accompany the ownership of land similarly situated. *But, in such cases, it is the peculiar province of the jury, under proper instructions from the Court, to decide whether or not the acts of dominion relied upon, considering the size of the tract, its peculiar condition and appropriate use, were of such a character as usually accompany the ownership of lands similarly situated.* As already stated, the erection of a fence across the neck of a small peninsula, might, of itself, under certain circumstances, be a sufficient act of dominion to establish an actual possession. But, in such cases, there can be no rule of universal application, and each case must depend on its own circumstances; and where an inclosure, consisting partly of natural and partly of artificial obstructions, is relied upon as, in itself, establishing a *possessio pedis*, it is the province of the jury, upon all the proofs, and considering the quantity, locality and character of the land, to decide whether or not the artificial barriers were sufficient to notify the public that the land was appropriated, and to impart to the claim of appropriation the notoriety and *indicia* of ownership which constitute so important an element in a *possessio pedis*."

It would seem that the decisions cited above, establish it as the law of Texas, first, that the mere extent of the water boundary is not of itself conclusive on the question of enclosure for the purposes of statutes of limitation; second, that under circumstances substantially identical with those in this case a water barrier of even greater extent, relative to the extent of the artificial barriers, than that in this case, may be ade-

quate to complete an enclosure for the purposes of the statutes of limitation, and, third, that the question whether such a barrier was in the present case adequate for that purpose was a question of fact for the jury under all the other circumstances proven.

A. The five-year statute (Sayles Texas Statutes, Art. 5674, being Section 16 of Act of February 5, 1841, as amended by Chapter 125 of the Acts of 1879) :

In addition to possession this statute requires that the person pleading it and/or his predecessors in title should for some period of five consecutive years have been using and enjoying the property, paying the taxes thereon, if any, and claiming under a deed or deeds duly registered.

For the purposes of the statute separate enclosure of the very land in dispute is unnecessary, nor, if it be enclosed with other lands, is the total acreage of the enclosure material (Dunn vs. Taylor, Supreme Court, *supra*; Hardy Oil Co. vs. Burnham, 124 S. W., 221; Church vs. Waggoner, 78 Texas, 200; Harris vs. Bryson, 80 S. W., 105; Cunningham vs. Mathews, 57 S. W., 1114).

1. Any instrument which is not void on its face and purports to be a deed conveying the land in question is sufficient under the statute, whether it proceed from one having title or not (Schleicher vs. Gatlin, 85 Tex., 270; Harris vs. Bryson, 80 S. W., 105).

Disregarding as unimportant, because cumulative, all earlier instruments in the chain, defendants hold under an unbroken succession of deeds, all duly recorded, as follows :

Deed of partition between T. M. Coleman and others of the first part, and J. M. Mathis and others of the second part, by which the 1,280 acres covered by bounty warrant No. 3894 was set apart to T. M. Coleman and Youngs Coleman. This deed was dated August 7, 1879, and recorded August 30, 1879 (Trans., p. 76).

Deed T. M. Coleman, Youngs Coleman and others, to Coleman-Fulton Pasture Company, conveying the same premises with other lands. This deed was dated January 25, 1881, and was recorded June 11, 1881 (Trans., p. 76).

Deed of the easterly part of Section 56 of the Paul Company subdivision from Coleman-Fulton Pasture Company to W. L. Dusenbery, dated September 10, 1908, duly recorded January 27, 1910, and mesne conveyances, all duly recorded, into T. N. Pullin (Trans., pp. 81, 83).

Deed Coleman-Fulton Pasture Company to W. L. Dusenbery, conveying the southeast quarter of Section 41 of the Paul Company subdivision, dated August 7, 1908, duly recorded July 6, 1909, and deed of same from Dusenbery to Widergren and Anderson dated August 7, 1908, recorded August 4, 1909 (Trans., p. 81).

Sheriff's deed to Alice State Bank conveying northeast quarter of Section 41 of the Paul subdivision, made pursuant to proceedings in foreclosure of Coleman-Fulton Pasture Company's vendor's lien, dated December 2, 1913, and recorded December 2, 1913 (Trans., p. 118).

Under these and the other deeds referred to Coleman-Fulton Pasture Company became owners by a valid title exclusive of all claims. That title devolved by deed and other proceedings as above set forth upon the defendants Pullin, Widergren and Anderson and Alice State Bank, respectively.

2. As we have already pointed out, taxes upon the Houston Survey were paid in each year from 1872 down to 1909, by Coleman, Mathis & Fulton, Coleman & Fulton and Coleman-Fulton Pasture Company in succession (See above pp. 26, 27; also Trans., pp. 93, 94, 97, covering 1878 to 1902; p. 117, covering 1889 to 1907, and 1908). The taxes on the Pullin tract were paid in each year from 1909 to 1914 inclusive (Trans., p. 114). So also were the taxes on the

Widergren and Anderson parcel (Trans., p. 113). See, also, note on page 25 of this Brief.

3. At least for the period between 1882 and 1908 the tract in question was enclosed and possessed, used and enjoyed, for all of the purposes of the statute, by Coleman, Mathis & Fulton, Coleman & Fulton and Coleman-Fulton Pasture Company. After 1879 the possession was under deeds duly recorded. The land was suitable for the pasturing of cattle and the user shown was for that purpose.

The Texas Courts have repeatedly held that the pasturing of cattle on enclosed land is persuasive evidence to show user supporting a claim of adverse possession.

In *Loring vs. Jackson*, *supra*, it was held that the keeping of five thousand cattle on a tract of 26,000 acres, no other cattle being allowed thereon, was "of some force in connection with the circumstances of the enclosure."

In *Randolph vs. Lewis*, 163 S. W., 647, it is said :

"The evidence showed that appellee, immediately after purchasing the land, placed his deed upon record, enclosed the land, and had continuously used it for a period of more than five years as a pasture for cattle, hogs and goats, paying taxes thereon. Such user is sufficient to show adverse possession. See *Hooper vs. Acuff*, 159 S. W., 934. Pasturing cattle on land enclosed for that purpose, and which is under the exclusive control of the party claiming under the statute, is such use and enjoyment as is sufficient." *Hardy Oil Company vs. Burnham*, 124 S. W., 221.

In *Hardy Oil Company vs. Burnham*, 124 S. W., 221, it is said :

"The statement of appellees' witnesses that the whole country, including the Parker league, was an open range, is not inconsistent with the fact that the league was enclosed in a 30,000 acre pasture, with no fences separating the Parker league from the balance of the land.

"The case is not analogous to one of enclosed land upon which the claimant pastures his cattle. Pasturing

the owners' cattle upon land enclosed for that purpose and under his exclusive control is such use and enjoyment of it as would be sufficient under the five years' statute."

See, also, *Church vs. Waggoner*, 78, Texas 200, and *Harris vs. Bryson*, 80 S. W., 105.

In connection with this point, it will be recalled that prior to 1872 it had been the custom of cattle owners to permit their cattle to range at large over the country, and particularly upon the lands of Coleman, Mathis & Fulton and their successors. In the year mentioned, however, Coleman, Mathis & Fulton, gave notice to these owners to come and get their cattle, as thereafter the land which they had enclosed was to be used solely by them; and never since that day have the cattle of any other owners been permitted to run thereon, nor has any part of the land ever at any time been used by anyone for any purpose except by those claiming under Coleman, Mathis & Fulton; and that firm and their successors have without question or interference pastured thousands of head of cattle upon the enclosure. The Pistola Camp, which is on the land involved, was for many years one of the headquarter camps on the ranch, used from 1872 down to 1908; and fence riders "rode the fences" to see that they were kept up and strangers kept out.

It is not to be overlooked that the assertion by unequivocal acts of a claim of title began more than forty years before the institution of this suit, during all of which time the purchasers and those claiming under them have continued in the use and enjoyment thereof, asserting ownership and bearing the burdens of taxes and improvements. Not only have the adverse claimants to the land been relieved of these burdens, but it is a fair inference that the heirs of Sam Houston, their predecessors in the title, themselves shared under his will in the \$600 which was paid to his executor in 1871 as a consideration for the certificate through which the defendants derive their title.

From the foregoing it fairly appears that not later than 1887, as to undivided interests not affected by the question of coverture, the cause of action of the plaintiff was barred by the five-year statute.

B. The ten-year statute (Sayles Texas Statutes, Art. 5675, being Section 17 of the Act of February 5, 1841):

Defendants claim, and believe that they have established, that their title was good by possession under the five-year statute; and their recourse to the ten-year statute is merely cumulative.

Until amended in 1891, as below set forth, this statute required only that in addition to purely technical possession the person having possession shall have been "cultivating, using or enjoying the same": For the purposes of this, as well as the five-year statute, the continuous user of the land for pasturage of cattle would, of course, of itself be user and enjoyment. In addition to this, as we have shown above, we have in the present case the fact that the Houston Survey was continuously for over twenty years used as headquarters camp, and improved with cattle pens and other structures for that purpose.

Under Article 5676 (*supra*) the limitation of the claimant under the ten-year statute to 160 acres only applies where there is no actual enclosure or "written memorandum of title other than a deed." When there is such memorandum or enclosure the possession will be construed as "co-extensive with the boundaries specified in such instrument" or with the enclosure.

We submit, therefore, that but for the amendment of 1891, given below, there would be nothing under the ten-year statute calling for further discussion.

The amendment of 1891 provided that:

"Possession of land belonging to another by a person owning or claiming five thousand acres or more of land enclosed by a fence in connection therewith, or

adjoining thereto, shall not be the peaceable and adverse possession contemplated by Article 5675, unless said land so belonging to another shall be segregated and separated by a substantial fence from said lands connected therewith or thereto adjoining, or unless at least one-tenth thereof shall be cultivated and used for agricultural purposes, or used for manufacturing purposes, or unless there be actual possession thereof."

There is some proof in this case that from time to time some portion of the Houston survey was cultivated, but there is nothing to suggest either that that cultivation was continuous for ten years or that it at any time amounted to one-tenth of the survey. If, therefore, our title were not good under the five-year statute, or under the ten-year statute prior to 1891, the question what the Legislature meant by "actual possession" in the closing clause of the amendment of 1891 would be material.

In view of the fact that the things required by the statute before amendment—to-wit, enjoyment, user and possession—satisfy the requirements of every discoverable definition of the words "actual possession", the meaning of the amendment of 1891 is somewhat obscure; nor do the Texas cases seem to throw light upon it.

It appears from the several reports in *Dunn vs. Taylor* (*supra*) that the tract there in question was used for purposes of cattle pasture, and on both appeals to the Court of Appeals it was held that so far as the character of user was concerned possession was sufficient not only under the five-year but under the ten-year statute. This was affirmed in the Supreme Court so far as the general principle was concerned, but it was held by that Court that the possession had been interrupted from time to time during the ten years and therefore was not continuous within the requirements of the statute.

See, also,

Howard's Unknown Heirs vs. Skolant, 162 S. W., 978, and
Sullivan vs. Fant, 160 S. W., 612.

The amendment plainly contemplates that some kind of user other than for agricultural or manufacturing purposes will be sufficient to come within the requirements of the statute, and it would seem to follow as a necessary consequence that it is not essential to "actual possession" within the contemplation of the amendment, that every foot of the disputed tract be subject to some continuous specific use. In *Howard's Unknown Heirs vs. Skolant* (*supra*) the Court said that it was the intent of the Legislature by the amendment

"to mitigate to a certain extent the evil of anyone acquiring title by means of such large enclosures that the owners would have difficulty in ascertaining whether their land was enclosed, use made thereof, and the same held adversely, when the only evidence thereof was that a line of fence extended along the same and stock was permitted to graze thereon."

In the case at bar, as already pointed out, in addition to the enclosure, the announcement by Coleman, Mathis & Fulton of their purpose to exclude the cattle belonging to others, and the fact that cattle were continuously grazed over the pasture, we have proof that Coleman, Mathis & Fulton built upon that part of the land involved in this litigation which lay in the Picatche pasture a pen about two hundred feet square, a well, a wind-mill and a house. In this house caretakers of the cattle and property for Coleman, Mathis & Fulton lived, and the house was thus occupied for many years. The pen was used for rounding up and branding cattle up to 1908 (See testimony of Joe Tumlinson, Trans., p. 107). The cattle came to the well and tank for water. The wind-mill gang and the fence gang stopped over night at this house; in fact, according to testimony of the witnesses, it was one of the several head camps on the ranch. The improvements were erected as early as 1872 or 1873, and the testimony shows that the pens and the house were used as late as 1908, and, in fact, the wind-mill and tank were in use up to the commencement of this

suit. The company had many head of cattle pastured on these places, sometimes as high as forty thousand head (See testimony of Jas. C. Fulton, Trans., p. 94).

It would seem that these facts would at least take our case outside of the evil referred to in the Skolant case at which the amendment of 1891 was aimed. We also think that *Dunn vs. Taylor (supra)* is authority for the proposition that user similar to that shown in this case is "actual possession" within the meaning of said amendment. But if we are wrong in this, it still remains to inquire whether the period of the ten year statute had run prior to the adoption of the amendment of 1891. That brings up first the question when the Doyle Waterhole fence was built, and, we think, for the purposes of this appeal, it must be taken that it was built in 1878. For Newt Rachal testified that he moved out of the country in 1878, and that he knew that the Doyle Waterhole fence was built by that year (pp. 100, 101): and against this there is nothing but the testimony of the witness Reed, who testified that he went to work for Coleman, Mathis & Fulton in 1878 and that the Waterhole fence was built "a short time after I went to work—possibly 1881 or 1882" (p. 104). If the Waterhole fence was finished in 1878 the ten-year statute of limitations had run in our favor prior to 1891, except as against married women.

But even if it has to be taken for the purposes of this appeal as doubtful whether the Doyle Waterhole fence was built prior to 1882, the enclosure of the land in controversy was complete, for the purpose of the statute of limitations, in 1873. It will be recalled that in 1872-1873 fences were completed so that the entire tract claimed and occupied by Coleman, Mathis & Fulton east of the Pistola fence was fenced on the west by the Pistola fence; on the north by the Chiltipin fence, at first throughout the whole length of the creek and later only down to where the backed up water made deep water that cattle could not cross; and

for a considerable portion of the easterly side by the fence which ran from Puerta Bay to Corpus Christi Bay between the Coleman, Mathis & Fulton and the McCampbell lands. The fences could not have been less than twenty-five miles in length. It will appear from an inspection of the map, as borne out by the testimony of the witness Reed, that the water front was not more than fourteen miles.

In *Loring vs. Jackson (supra)* it will be remembered that on a state of facts very similar to this, possession was held good where there were only fifteen miles of fence to about twenty miles of water front.

If we are right in this claim then irrespective of the date of the building of the Waterhole fence, the ten-year statute had run prior to the amendment of 1891, except as to married women.

Finally, it is quite evident from the record that it was not on the ground of the amendment of 1891 that the case was decided against us below.

Effect of Coverture.

Of Houston's children four were daughters—to wit, Nannie E., Mary W., Nettie P., and Margaret L. (p. 66). Of these the first three and the children of the fourth were among Houston Pasture Company's grantors (p. 67). Nannie E. married in 1866 and her husband, J. C. S. Morrow, was still living at the time of the trial; Mary W. married 1871 and her husband, J. S. Morrow, died 1885; Nettie P. married 1877 and her husband, W. S. Bringham, died 1913; Margaret L. married 1866 and her husband, W. L. Williams, died 1889 (p. 66).

By Act of February 5, 1841 (*Paschal's Digest*, Art. 4617), it was provided that:

"No law of limitations * * * shall run against infants, married women * * * during the existence of their respective disabilities; and when the law of limitations did not commence to run prior to the existence

of these disabilities, such persons shall have the same time allowed them after their removal, that is allowed to others by this and other laws of limitations now in force."

These disabilities were by express terms available against claims under either the three-year, five-year or ten-year statutes (Paschal, 4622, 4623, 4624).

Under the statute, however, disabilities were not cumulative (*White vs. Latimer*, 12 Tex., 61-65; *Thompson vs. Cragg*, 24 Tex., 582; *Sawyer vs. Boyle*, 21 Tex., 28, 29), that is, if the statute began to run prior to the arising of the disability, or the devolution of title upon a person under disability, its running was not interrupted by the intervention or during the continuance of the disability (Rev. Stat. Art. 5711; *McDonald vs. McGuire*, 8 Tex., 361; *Broom vs. Pearson*, 98 Tex., 469; *Johnson vs. Schumacher*, 72 Tex., 334).

By Act of March 13, 1848 (Sayles, Art. 4628, being part of the chapter on husband and wife) it was provided that:

"Every female under the age of twenty-one years, who shall marry in accordance with the laws of this state, shall, from and after the time of such marriage, be deemed to be of full age, and shall have all the rights and privileges to which she would have been entitled had she been at the time of her marriage of full age."

This act operated only on the disability of infancy. If a cause of action accrued before the marriage of a minor, the marriage started the statute running since it terminated the legal status of infancy, and disabilities being noncumulative and the coverture being deemed to be the only disability, and having arisen subsequent to the time when the statute, but for the infancy, would have begun to run, did not affect the running of the period limited by the statute (*White vs. Latimer*, 12 Tex., 61; *Thompson vs. Cragg*, 24 Tex., 582); though, if the cause of action accrued during coverture, and

irrespective of infancy, the running of the statute was suspended during the coverture (*Tavis vs. Collier*, 84 Tex., 638).

By Act passed in 1895 the section respecting disability for the purpose of statutes of limitations as to real estate was amended by dropping coverture from the list of disabilities, and adding the proviso—

" that limitation shall not begin to run against married women until they arrive at the age of twenty-one years; and, further, that their disability shall continue one year from and after the passage of this act, and that they shall have thereafter the same time allowed others by the provisions hereof " (Act of 1895, p. 35 ; Revised Statutes, Art. 5684).

The operation of this amendment was to revive the disabilities of infancy, and to abolish the disability of coverture from and after July 29, 1896, being one year after the passage of the act (*Broom vs. Pearson*, 85 S. W., 790 ; *Anderson vs. Wynne*, 62 S. W., 121 ; *Shook vs. Laufer*, 100 S. W., 1042-1046).

Applying the above to the facts of this case :

The building of the Doyle Waterhole fence completed (certainly there was evidence to go to the jury upon the point), the enclosure of Picatche Pasture for the purposes of the statute, and in that case the five-year statute had run against the interests of all four daughters five years after July 29, 1896, that is, not later than July 29, 1901. If, on the other hand, we had "actual possession", as the evidence clearly *tends* to show, for the purposes of the ten-year statute as amended in 1891, then that statute, also, had run against the interests of all four daughters not later than July 29, 1906, and it is only in case there was *no* evidence to justify the submission to the jury of the question whether we had "actual possession" within the meaning of the ten-year statute as amended, that the direction of a verdict on the theory that the statute had not run against Nannie, Mary and Margaret at the time of trial in any event could have been sustained (*Kimbo*

va. Hamilton, 28 Tex., 560). Even though the disability of coverture was not ended as to any of them until within ten years of 1891, and the disability of one of them survived until 1896, we submit that there was ample evidence to go to the jury that the "actual possession" continued long enough thereafter to bring into effect the bar of the ten-year statute.

The case of Nettie is different: She did not marry until 1877. While there is no evidence to show that the Doyle Waterhole fence was built before 1878, the Pistola fence, the Chiltipin fence, and the fence along McCampbell's land from Puerta Bay to Corpus Christi Bay, had all been built in 1873, and we claim (*supra*) (and there was ample evidence for the jury to so find) under authority of Loring vs. Jackson that from 1873 our possession was adverse for the purposes of the statute, and therefore that the statute began to run against Nettie's interest before 1877 (White vs. Latimer, *supra*). If we are right in this then the ten-year statute had run against the interest of Nettie by the end of the year 1887, and it is immaterial so far as the application of the ten-year statute is concerned whether or not our possession was of such character as to satisfy the requirements of the amendment of 1891.

Summary of Our Claims as to the Statutes of Limitations.

There was evidence sufficient to require the court to submit the case to the jury and a verdict would have been justified by the evidence, from which each of the following conclusions of law would have followed, viz.:

(1) The five-year statute had run against the interest of all of the children of Houston before this action was begun.

(2) Because the Doyle Waterhole fence was built in 1878, the ten-year statute had run against the in-

terests of all of Houston's sons before the amendment of 1891.

(3) Because the enclosure was adequate for the purposes of the statute from 1873, the ten-year statute had run against the interest of Nettie before the amendment of 1891.

(4) Because our possession was "actual possession" within the meaning of the amendment of 1891, the ten-year statute had run against the interest of all of the children of Houston on or before July 29, 1906.

SECOND POINT.

The verdict and judgment should have been against Houston Pasture Company because, independently of the statutes of limitations, defendant's paper title was paramount to the title propounded by Houston Pasture Company.

As we have pointed out above, the question of error in the Court's charge and instruction to the jury that the "legal title to the 1,280 acres of land in question is in the plaintiff in this case," was well raised by exception and assignments of error.

The warrant for bounty lands issued to Houston in 1838. He located it in Polk County in 1853 and apparently never took possession, and the Polk County land has since been relocated by other persons. The warrant was confirmed by the Legislature in 1870; sold by Houston's executors to Coleman, Mathis & Fulton in 1871; located by them on the lands in question in 1872; and patented in 1874, the patent reading "to the heirs of General Sam Houston, their heirs or assigns." Houston Pasture Company claims by virtue of the patent of 1874, claiming that its grantors, the children and grandchildren

of General Houston, as his heirs, were entitled to succession in the title by virtue of the Act of 1870 and the patent of 1874 issued pursuant to its terms. The defendants claim under the sale by Houston's executors in 1871, and rely upon the Act of 1870 as merely reviving the warrant in favor of the *executors* and not the *heirs*.

In Texas as elsewhere the plaintiff in trespass cannot recover against even a bare trespasser unless he shows either a prior possession in himself, or in some one under whom he claims, or a valid paper title from the State. Neither Houston Pasture Company nor any of its predecessors in the chain of title that it propounds was ever in possession; therefore Houston Pasture Company must show *prima facie* a valid paper title originating by sovereign grant and devolving upon it by an unbroken chain.

If there were nothing in evidence but the patent of 1874 the *prima facie* case of the plaintiff would perhaps be made out, but it cannot repudiate the Act of 1870 as a part of the origin of the title evidenced by the patent, nor does it seek to. It offered the Act in evidence as part of its chain and the trial Court treated it as such.

The Act of 1870 is as follows :

" CHAPTER XIX.

" An Act for the Relief of the Heirs of General Sam Houston, Deceased.

"SECTION 1. Be it Enacted by the Legislature of the State of Texas, That the land certificate heretofore issued by the lawful authorities of the late Republic of Texas, to General Sam Houston for military services from November, 1835, to October, 1836, for twelve hundred and eighty acres be, and the same is hereby approved, and declared to be a just claim from its original date against the State of Texas; and that the Commissioner of the General Land Office be and is hereby authorized to issue a patent on the same, in the name of the heirs of General Sam Houston, deceased.

"SECTION 2. That the owners of any land certificate, located on land in conflict with a previous location made by virtue of the foregoing warrant, and not patented, are hereby authorized to locate the same on other lands; and that this act take effect and be in force from and after its passage."

In 1866 there had been a relocation and survey for George Alford on the lands in Polk County located by Sam Houston in 1853 under the Houston warrant. The language of Section 2 of the Act of 1870 shows that the Legislature recognized its inability to divest rights which might have sprung from such facts as these. It is equally clear that it could not have been the intent of the Legislature to confine the beneficiaries of the Act of 1870 to the location made either in 1853 or in 1866, for that would have been simply to enact that the warrant should be validated, and that the beneficiaries of the Act should be entitled to lands, only in the event that the Polk County lands had not theretofore been patented to some other person. It is obvious, therefore, that it must have been the intent of the Legislature that the defect in the warrant, whatever it may have been, should be cured so as to permit a relocation at any place within the State. The act was thus not a grant of specific lands but resulted in a float, and left the right conferred by the original warrant to be transmuted into an interest in specific lands by location in accordance with the general law of the state; and it follows that for all purposes of this action the location and relocation in Polk County are eliminated from consideration, and the validity of the location in 1872 must be taken as an essential feature in the case.

By Section 6 of Article 10 of the Constitution of 1869, taking effect December, 1869, and remaining in force until April 7, 1876, it was provided that:

"The Legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office, except to actual settlers upon the same and in lots not exceeding 160 acres."

The Act of 1870 was passed July 22nd of that year.

Plaintiff may contend that the Act of 1870 was void as in contravention of the above constitutional provision, and that therefore no rights in or under the warrant could be acquired; and that the patent having actually issued, vested a title good as against all the world but the state of Texas, and sufficient to support plaintiff's claim of title unless and until cancelled by the state. We think, in the first place, that having offered this act in evidence as a part of its claim of title the plaintiff is precluded at this stage from repudiating its validity. In the second place, even if the plaintiff is not thus estopped there would be no virtue in its contention.

While it is a general principle of law that where power is conferred upon a land office to entertain applications for patents and to inquire into the merits of the application, the patent cannot be collaterally questioned, but remains in force as against all the world until cancelled at the instance of the state, it is utterly illogical to apply this doctrine to the facts of this case. For it is apparent on the face of the record that the land office in 1874 could not have acted, and did not act, by virtue of any power conferred upon it by general law to inquire into the right of the heirs of General Sam Houston to a patent for lands. It obviously acted without inquiry and solely by virtue of the specific authority conferred in the Act of 1870. If the warrant issued to Houston was void and the Act of 1870 was void, the direction in the Act that a patent issue was also void; and a patent referable on the face of the record to the Act of 1870 and to nothing else, was equally void; for where it is apparent that a patent is issued not by virtue of constitutional powers, but outside of those powers and solely in pursuance of a legislative mandate contained in a special act which is a nullity, the patent itself must be a nullity.

It would seem to follow, therefore, that it must be taken as an essential part of the plaintiff's case that the Act of 1870

was a valid legislative act and not such a grant as was within the prohibition of the Constitution.

But the Act of 1870 could have been constitutional solely for the purpose of validating and giving force to the transfer in 1871 of the warrant by the surviving executor of Houston, and the location in 1872 by Coleman, Mathis & Fulton under that warrant.

For if the Act be interpreted as an attempt to create a right in land not therefore existing, it would be in conflict with the provision of the Constitution prohibiting grants which are pure gratuities. If, on the other hand, it be construed as a mere recognition of the pre-existing right created by the original Houston warrant of 1838, and even though but for the passage of such special act that right would not have been provable, it would nevertheless be within the legislative power under the Constitutional provisions referred to above (*Holmes vs. Anderson*, 59 Tex., 481; *Bacon vs. Russell*, 57 Tex., 409).

There is nothing in the record to show that there was any defect in the warrant issued to Houston, unless it be that it was issued for less than twelve months' service. It was issued by the Secretary of War of the Republic of Texas. Under the law in force when it was issued it was the Secretary of War who was clothed with power to enquire into the right to bounty lands for military services and to grant certificates of such right. While subsequent legislation has required an inquiry *de novo* before one or another commission or tribunal into warrants issued for other purposes, no legislation has ever required any review or further sanction of warrants issued by the Secretary of War for bounty lands for military services.

The only possible defect that can be discovered in the warrant as originally issued was that whereas under an act of December 4, 1837, the soldier was to have 320 acres for three months' service, 640 acres for six months' service, 960 acres for nine months' service, and 1,280 acres "to all who have served twelve months or upwards" it appears on the face of the warrant that 1,280 acres was awarded to Houston for services of

only eleven months. All reasonable presumptions are to be indulged in favor of the constitutionality of the Act of 1870. The language is not that of a new grant. It *approves* the warrant and declares that it was a just claim against the state of Texas from its original date. It must be assumed that the Act was passed upon evidence satisfactory to the Legislature that though the warrant were technically defective in some point, Houston's claim was and always had been valid and just.

By an act of August 30, 1856, (Revised Statutes, Art. 4134), a time-limit was placed upon entry and location under a warrant, but in 1856 there had already been a location under Houston's warrant on the Polk County lands ; and there is nothing in the record to show that this location was defective. As we will show below, it is and always has been the law of Texas that as between the warrant holder and the state, location confers upon the warrant holder a vested right in the lands so located. If, therefore, the warrant was valid in its origin, and the location valid, the whole effect of the Act of 1870 was to permit a relocation, and that was not a "grant" within the meaning of the prohibition, for it was not a gratuity.

If we admit for the sake of the argument that the warrant was void, that the Act of 1870 was unconstitutional, and imparted no validity to the warrant, and that consequently the assignees of the warrant acquired originally no rights by virtue of that assignment, and admit further that notwithstanding any invalidity of the Act of 1870 the patent when actually issued was good as against everybody but the state, we think that nevertheless the title derived under Coleman, Mathis & Fulton is the better paper title.

The Constitution of 1876, which went into effect on April 18th of that year, did not contain the provisions of Section 6 of Article 10 of the Constitution of 1869 or any similar provision.

By Chapter 49 of the Laws of 1883 it was enacted by the Legislature of Texas that

"all surveys and patents by virtue of headright or bounty warrants issued under special laws enacted after March the 31st, 1870, and prior to April the 11th, 1876, to which there is no valid legal objection other than that such special laws are supposed to be in conflict with the Constitution then in force, are hereby validated and confirmed and declared to be as binding upon the State as they otherwise would be if such special laws had been permitted by Constitution; provided that, if such headright or bounty certificates have been forfeited under existing laws by location and survey on appropriated land, this act shall not be construed to revive the same: provided further, this act shall apply only to soldiers and heirs and actual settlers of Texas, and their vendees, to whom lands have been granted."

It would seem quite obvious that if the Act of 1870 was unconstitutional and the Houston warrant void, the patent of 1874, even if operative to vest a legal title in the patentee as against all the world but the state of Texas, conferred no rights which could be asserted as against the state of Texas. The beneficial interest in the land would in that case remain in the state of Texas, and, at the suit of the state, the patent must have been adjudged void, and it would seem, therefore, conferred no right which would prevent the state of Texas from creating by legislation a beneficial, equitable interest in third persons attaching or paramount to the naked legal title under the patent.

The Act of 1883 validates surveys and patents by virtue of warrants *issued under special laws*. While in terms it does not validate warrants issued prior to the passage of special laws which purport to validate such warrants, to limit the act literally so as to exclude surveys and ~~warrants~~ ^{patents} validated by earlier laws, would make distinctions where no logical ground for difference in legislative policy could exist. If the Act

of 1870 had provided that a new warrant should issue in confirmation of the old, then our case would have been within the literal purview of the Act of 1883. That the Legislature of 1870 chose to confirm the old warrant and dispense with the empty form of issuing a new one in lieu thereof, would seem to furnish no logical ground for the Legislature of 1883 to exclude from benefit persons situated like Coleman, Mathis & Fulton. In order to avoid such groundless inequity great latitude should be indulged in the interpretation of the Act of 1883, and if that be done the legislative intent would be carried out by making the attempt of the Act of 1870 to feed validity and force into the Houston warrant, tantamount to a reissue of that warrant or to a direction that another piece of paper should be issued which would evidence identically the same right. This is in effect the interpretation that has been given to this statute by the court of last resort in Texas :

In *Ralston against Skerrett*, 82 Tex., 486, Skerrett, who had been a volunteer in the war with Mexico, obtained in 1841 a certificate for a headright of lands. He proceeded to locate under the certificate and then conveyed the land and the certificate to Robins & Company, warranting title to both land and certificate. Robins & Company conveyed to Horace W. Robins. The original certificate was never approved by either land board or court, as was required by law. In 1873 an act was passed directing the commissioner of the land office to issue a certificate to "M. B. Skerrett" for land "to which he is entitled as a volunteer in lieu of No. 36 issued in Travis County". Certificate in the name of Skerrett was issued accordingly. This certificate H. W. Robbins assumed to convey to Price, and thereafter patent was issued to Price. The plaintiffs were heirs of Skerrett. The defendants claimed through Price. Skerrett died a short while before the Act of 1873 was passed. His heirs claimed that the original certificate was void; that the Act of 1873 was intended as a gratuity to Skerrett, and therefore there

was nothing on which Skerrett's deed and warranty to Robins & Company could operate ; that what was given validity by Chapter 49 of the laws of 1883 was merely the certificate that was issued under the Act of 1873 in Skerrett's name. But the Court held that it was the obvious intent of the Act of 1873 to grant a new certificate as in recognition of the original right existing by virtue of the certificate of 1841 ; that it was the intent of the Act of 1883 to revive that original right and all rights acquired under it ; that it was not necessary for the purposes of the Act of 1883 that the vendee spoken of should have purchased of the soldier after the passage of the special act, and that *not only was the original right revived but all transactions by the soldier in respect to that right prior to the passage of the special act were valid.*

In the Skerrett case the Court discovered the intent of the Act of 1873 to validate the original right from the fact that the act directed that the new certificate issue "in lieu of" the old one. In our act the original right and the original certificate are in express terms approved and the right is declared to be a just claim both as of the date of the validating act and also as of the time of the creation of the right itself. It is true that in the Skerrett case a certificate did issue under the Act of 1873, but the survey which was held to have been validated was made long prior to that, and of course, quite independently of the certificate issued in 1873. In short, the decision in the Skerrett case amounts to this—that where the operation and effect of the special act would have been, but for the constitutional prohibition, to revive and validate a pre-existing right and prior transactions in respect thereto, the operation of the Act of 1883 is to give that same effect to those rights and transactions.

We thus arrive by several different routes at the conclusion that for the purposes of this case the meaning and intent of the Act of 1870 is controlling, and that the constitutional question as to the original validity of that Act is eliminated.

The Houston Pasture Company's theory of the case seems to be that the provision in the Act of 1870 that :

"The commissioner of the general land office be and is hereby authorized to issue a patent on the same in the name of the heirs of General Sam Houston, deceased,"

was the controlling feature of the Act to which all other parts must yield, and that it had the force and effect of a mandate that the patent whenever issued should be issued to and confer the title upon those individuals then answering the description of *heirs* of General Houston. It seems to us that this theory is obviously fallacious. The act in terms first approves the warrant and declares that the warrant was a just claim from its original date. To interpret that as merely meaning that General Houston had a valid but inchoate and unassignable claim is to ignore its language. The meaning that General Houston must be deemed to have had a valid warrant from 1838 is too clearly expressed to admit of construction, and to interpret the authorization of a patent to the "heirs" of Houston as a rigid mandate calling for a patent to the individuals corresponding to the technical meaning of the word, utterly regardless of devolution of rights in the certificate in the meantime, were an absurdity.

With the fall of the theory that the authorization was intended as a rigid direction there is nothing left on which to hang the claim that the Act of 1870 inured exclusively to the benefit of the children of General Houston to the exclusion of his executors, except the fact that the Act is entitled "An Act for the relief of the heirs of General Sam Houston, deceased."

The Act of 1870 in its directly operative part "approved" "the land certificate heretofore issued," and "declared" it "to be a just claim *from its original date* against the state of Texas." If that were all it would not be open to question that it was the legislative intent that rights in and under the warrant were simply revived and were to devolve as

by the existing law relating to such warrants, rights thereunder generally devolved. There is nothing in the act to indicate a different intent except the fact that in the subsidiary or auxiliary clause relating to the issue of a patent the word "heirs" occurs. To give to the word "heirs" as used in that clause its technical legal meaning would be to introduce an idea repugnant to the primary intent of the act that the warrant was to be approved and ratified as of the date of its issue. Such a construction would not be reasonable and it is clear that the technical significance of the word "heirs" in the subsidiary clauses must yield, and the statute be given effect as an enabling act to revive lapsed legal rights. That the statute should be thus construed is settled by judicial authority in Texas.

In *Sherman vs. Pickering*, 56 Tex. Civ. App., 633, the facts were that one Sherman, having a right to bounty lands, sold one-half of his right before any warrant had been issued to him. In 1862 by special act the Legislature provided that the commissioner of the land office "be, and he hereby is, authorized and required to issue to F. A. Sherman a duplicate land warrant for 1280 acres of land in lieu of the original warrant for said quantity of land," * * *

Warrant and patent were issued in the name of Sherman. The Court said (p. 637):

"We do not think it can be doubted from the terms of the act itself that the certificate granted under the act in question in this case was given in consideration of the services of Sherman in the war for Texas independence, and in lieu of his barred claim, arising from the legal obligation of the state to grant him 1280 acres of land in consideration of his said services. Under this construction of the special act, under which the certificate was issued, it follows that the title thus acquired by Sherman inured to the benefit of his vendee."

In *Allen vs. Clark*, 21 Tex., 404, a certificate issued to the heirs of Clark. The Court said (p. 405):

"The mere fact that the certificate was issued to the heirs, does not make it their property in their individual,

personal capacity. They held only as heirs of the deceased, and the certificate was as much the property of the estate of the deceased as if it had been issued to his administrator."

In *Goldsmith vs. Herndon*, 33 Tex., 706, a certificate issued in the name of the heirs of Smith. It was held that the certificate was assets in the hands of the administrator and not a donation to the heirs.

In *Houston Oil Company against Gallup*, 60 Tex. Civ. App., 369, the facts were: In 1834 a head right warrant issued to Patsey Lewis. This she located before her death. She died in 1843 devising the land to three out of a number of children. In 1850 a special act was passed which was entitled "An Act for the relief of the heirs of Patsey Lewis, deceased," and provided that the commissioner of the general land office

"be, and he is hereby, authorized and required to issue to the heirs of Patsey Lewis, deceased, upon their paying the usual fees and governmental dues, a patent for 3,562 acres of land, that being the residue of a league to which said Patsey Lewis in her lifetime was entitled":

The plaintiff derived title through the *heirs*; defendant derived title through the *devises*. It was held by the trial court that Mrs. Lewis had no title to the land which could be subject to testamentary disposition; that the special act was an act of bounty and inured to the benefit of the heirs.

On appeal to the Court of Civil Appeals this was held to be error. It was said that while Mrs. Lewis had not an absolute title, the land had been segregated from the public domain and she had acquired a right—an equity capable of being so perfected as to vest in her an absolute title; that she died owner of that equity; that it was such equity that the Legislature referred to when it declared that she was entitled to it in her lifetime; that the act was plainly intended as a recognition of and provision for the enforcement of a right, and not as a donation, and finally that it was a right existing in

Patsey Lewis and not in her heirs, and that "the title, when perfected" by the Act of 1850, vested in the devisees.

If there be any difference on their face between the Act of 1850 under consideration in the Houston Oil case and the Act of 1870 reviving the rights under the Sam Houston warrant, it is that in the latter the intent that the statute should operate upon the right which existed in Houston at and before his death is even more manifest than in that reviving the rights of Patsey Lewis. It is true that it appeared in evidence in the Houston Oil Company case that it was the administrator of Patsey Lewis who applied to the Legislature for the passage of the Act, but that is merely an additional and not a determinative circumstance. Furthermore, circumstantial evidence in the case at bar would have justified an inference that it was upon application of the executors of Houston that the Act of 1870 was passed.

In *Ralston vs. Skerritt*, *supra*, a special act provided for the issuance of a land certificate to M. B. Skerritt. It was held that it was the intent of the act that it should operate, and it did operate, for the benefit of the person to whom Skerritt had theretofore assigned his right.

In *Lyne vs. Sanford*, 82 Tex., 58, it was provided that a certificate should issue "to the heirs or legal representatives of Willis A. Ferris." The Court held that on the face of the act the consideration moving the Legislature to grant a certificate was a right existing in Ferris; that the issuance of a certificate to the heirs did not make it their property; that it was subject to payment of his debts, and was assets of his estate.

It is clear upon the principle of these decisions that the warrant issued to Houston in 1838 must be taken as having been valid from the date of its issue down to the date of the location and survey in 1872, and that it was not the intent or

effect of the Act of 1870, either alone or in conjunction with the Act of 1883, to oust any power of disposition that the executors of Houston's will would have had, had there been no need of the curative legislation.

A survey having been made by the proper officer and certified and filed as required by law, and the warrant having been filed, we think it clear under the above decisions that it became the duty of the governor and the commissioner of the land office, under the Act of 1870, to issue a patent which would perfect the title under the warrant in Coleman, Mathis & Fulton. To issue a patent to any one else was unlawful, and it is the law of Texas that the patent of 1874, even if it is to be interpreted as running on its face to the persons answering the technical description of heirs, conferred no rights in them that could prevail in this action.

Neither the plaintiff nor any of the defendants claim or can derive any benefit under the location in Polk County in 1853 since any right asserted in this suit must rest upon the theory that the Act of 1870 either alone or by aid of the Act of 1883 resulted in a float, and restored to the warrant its quality as an unlocated warrant. Such a warrant is under the laws of Texas personalty, and on the death of the holder vests as an asset in his personal representative.

Porter *vs.* Burnett, 60 Tex., 220.

Ames *vs.* Hubby, 49 Tex., 705.

Rogers *vs.* Kennard, 54 Tex., 30.

Todd *vs.* Masterson, 61 Tex., 618.

Texas *vs.* Heirs of Charles Zanco, 18 Tex. Civ. App., 127.

Upon location and survey the warrant loses its character as property and becomes a mere muniment of title (*Simpson vs. Chapman*, 45 Tex., 560-566), and the holder immediately acquires a vested interest in the land itself, on which the location is made (*Abernathy vs. Stone*, 81 Tex., 430-434; *Duren vs. Railway*, 86 Tex., 287).

Whether that interest amounts to a legal or only to an

equitable title it partakes for substantial purposes in this action of the character of both an equitable and legal title. This is recognized in the statute relating to an action for trespass which provides :

" All certificates for head right, land scrip, bounty warrant, or any other evidence of right to land recognized by the laws of this state which have been located and surveyed, shall be deemed and held as sufficient title to authorize the maintenance of the action for trespass to try title " (Act of Feb. 5, 1841, Sec. 23 ; Sayles, Art. 7742).

Any right which is sufficient title to authorize the maintenance of the action for trespass to try title is necessarily sufficient title to support a defense to an action for trespass. And if by the location in 1872 Coleman, Mathis & Fulton became vested with a title by virtue of which they might have recovered the lands located from any other person by action of trespass, or could have defended against an action for trespass brought by any other person, they became possessed of property of which it was not in the power of the state of Texas to deprive them (Fourteenth amendment to the Constitution of the United States, Sec. 1 ; Texas Constitution of 1869, Art. I, Sec. 16 ; Texas Constitution of 1876, Art. I, Sec. 19). That the subsequent patent to the heirs of Houston could clothe the heirs with any right which they could assert against the locator (except under a statute of limitation), would be a proposition utterly repugnant to the law of Texas that location segregates the land from the public domain and vests it in the locator. And under that law it is equally plain that such locator has in the absence of counter-vailing equities, if not a paramount title for all purposes, at least a paramount paper title sufficient as a defense in a suit brought by a subsequent patentee. It would follow in the present case that whatever effect may be given to the patent of 1874, as between the children of Houston and the state, it is not a sufficient basis for a claim of title as against Coleman,

Mathie & Fulton and their successors; at most it is a mere naked legal title subject and subordinate to the title acquired by the purchaser of the warrant and by location.

In *Burleson vs. Durham*, 46 Tex., 152, the Court said (page 157):

„ If Durham, at the time Burleson located the land in controversy, was not so occupying it as to give him, under the statute, the right to purchase it of the state, the mere fact that a patent was afterward improperly issued *cannot affect* any rights which Burleson acquired by his location. His file and survey, if made on vacant public domain, subject thereto, gave to Burleson an equitable title, secured by all the constitutional guarantees for the protection of private property (*Wright vs. Hawkins*, 28 Tex., 471; *Sherwood vs. Fleming*, 25 Tex., Sup. 408). The case of *Styles vs. Gray*, 10 Tex., 503, cited by counsel for defendant in error, in support of the proposition that Burleson could not contest the validity of Durham's patent, appears to have been one in which the party who sought to attack the patent did not show that he had rights which were vested prior to its issuance.”

In any action to recover by virtue of a patent, the paramount title of the locator is a full defense.

In *Abernathy vs. Stone*, 81 Tex., 430, the Court said :

“ * * * but where the certificate is conveyed before it is located, and subsequently it is located and the land is patented in the name of the grantee of the certificate, it would seem that the assign obtains only the equitable title in the land by virtue of the transfer, and the legal title, *though inferior* to the equitable title of the assignee, vests in the grantee by reason of the location and patent from the state to him. This we think is the correct doctrine. *Hermann vs. Reynolds*, 52 Tex., 395; *Keyes vs. Railroad*, 50 Tex., 174; *Goode vs. Jasper*, 71 Tex., 51.”

In *Moore vs. Foster Lumber Company*, 231 Fed., 1, the facts were that Asbury, entitled as a colonist to a league and labor of land, made two successive assignments of his rights; then the warrant was located, and then patent issued to Asbury. The action was trespass

to try title, between parties claiming respectively through the first and second assignment. The Court said (p. 4):

"Under the Texas land laws, the owner of a head-right could sell his right by verbal or written contract, and in advance of the issue to him of the certificate evidencing his right or of the location of the land. The subsequent issuance of the certificate, location of the land, and issuance of a patent, though in the name of the colonist, inured to the benefit of the grantee, for whom the colonist then held the legal title to the land located."

This was by the Circuit Court of Appeals for the Fifth Circuit, in November, 1916.

Neal vs. Bartleson, 65 Tex., 478, was an action of trespass to try title. P. B. died in 1858 leaving infant children. In 1851 a guardian was appointed for the children. In 1852 a land certificate was issued under special act of the Legislature in the name of P. B. In the Fall of 1852 the guardian sold the certificate in pursuance of an order of the County Court. The purchaser had land located and surveyed under the certificate. In 1874 a patent was issued in the name of P. B., "his heirs or assigns." Complainants were the children. Defendants claimed under the purchaser from the guardian. Judgment below was for plaintiffs. On appeal the Court said:

"The ownership of the land in controversy must depend primarily upon the ownership of the land certificate under which it was granted. If this was in the appellants their equitable ownership is superior to the naked legal title which rested in the appellees through the patent."

Stubblefield vs. Hanson, 94 S. W., 406, was an action of trespass to try title. In that case a bounty warrant was issued to A. Before it was located it was sold by his administrator to B. Later a patent was issued to the heirs of A. Plaintiff's claim was under B; defendant's claim was under the patent as heirs of A. Judgment for the plaintiffs below was affirmed on appeal, and on motion for rehearing.

Abernathy vs. Stone (supra), was an action of trespass to try title. F. claimed under a head-right certificate. After location he transferred a portion of the certificate to the plaintiff. Thereafter patent issued to the heirs of F. Defendant was the sole heir of F. The Court held that location under the warrant gave an equitable title which was superior to the title granted by the patent, but that plaintiff's rights had been barred by limitation.

See to the same effect *Sherman vs. Pickering*, 56 Tex. Civ. App., 633, and *Allen vs. Clark*, 21 Tex., 404.

On the general proposition that an equitable title is available in Texas either as a cause of action or defense in an action of trespass to try title see *Neil vs. Keese*, 5 Tex., 23; *Burdett vs. Haley*, 51 Tex., 540; and *Robson vs. Moore*, 166 S. W., 908. In the latter case the court says:

"It is well established in this state that an equitable title can be sued upon or urged as a defense in an action of trespass to try title."

If we are right in our contention that it was the true intent and meaning of the Act of 1870 to revive the warrant of 1838 so that it should have like effect and be subject to devolution in like manner as though it had been valid from its origin, then it seems to us that the case of *Gullett vs. O'Connor*, 54 Tex., 408, disposes of all of the rest of the controversy.

In that case land warrants issued in 1840, and in that year location and survey were made under them; but no patent issued under them. Defendants, the appellants, claimed under this title. Later there was another location on the same lands under another warrant and in 1877 patent issued under the second location to Wren. Plaintiff, the appellee claimed under the patent. The title of the defendant was sustained. The Court said (p. 416):

"While the subsequent location of the land by the party under whom the appellee claims, was unauthorized, and the commissioner was forbidden by the Con-

stitution from patenting it upon such location, still the patent when issued is not absolutely null and void. It is voidable, or, as it is often phrased, void, as to those having a prior and superior equitable right to the land."

The Court then pointed out that the defendants might have had a cancellation of the patent in equity and the issuance of a new patent to them or a decree in equity to force the patentee to convey the title, but that it was unnecessary for them to have recourse to those remedies; that

"they had the right for the protection of their possession to show the superiority of the equitable title under which they were holding, over the legal title" of the plaintiff.

Finally, it is to be remembered that we are not confronted in this case by any of the questions which might have arisen had the Houston Pasture Company been a purchaser in good faith without notice. For the Act of 1870 in confirming the land warrant identified it completely; the field notes of the location identified it by number, and the assignment of that warrant, which also identified it by number, was recorded before the patent issued.

Under the recording acts as at the time in force in Texas any

"instrument of writing concerning any lands or tenements, or goods and chattels, or movable property of any description"

could be recorded (Sayles, Art. 6823).

Under Article 6842

"The record of any * * * instrument of writing authorized or required to be recorded, which shall have been duly proven up or acknowledged for record and duly recorded in the proper county, shall be taken and held as notice to all persons of the existence of such grant, deed or instrument."

Under Article 6825

"titles to land which may have been deposited in the general land office" could not be received in evidence as superior to a junior location and survey unless the older "title had been duly recorded in the office of the county clerk."

While the unlocated land warrant was in one sense not real estate, it was an instrument "concerning lands." Such land certificates have always been regarded "as chattels" (Porter vs. Burnett, 60 Tex., 220). It would seem, therefore, that either as an instrument concerning lands or as an instrument concerning chattels or moveable property the assignment of the warrant was entitled to record and was constructive notice.

Even if the record of the assignment of the warrant was not constructive notice, the fact that the successors in title of Coleman, Mathis & Fulton were in May, 1914, in actual visible possession of the premises in suit, having the whole of it completely enclosed by fence, constituted notice.

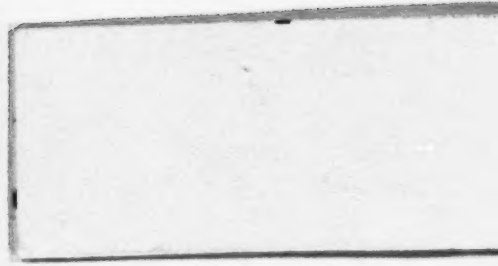
THIRD POINT.

The judgment below should be reversed.

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IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1917

ALICE STATE BANK ET AL.,

Plaintiffs in Error,

VS.

HOUSTON PASTURE COMPANY,

Defendant in Error.

No. 154

BRIEF FOR DEFENDANT IN ERROR

To the Honorable the Supreme Court of the United States:

Preliminary Statement.

We do not accept as accurate many statements made in the brief of plaintiffs in error in this case, but will, in this reply, endeavor to correctly state the controlling facts as we conceive them, and point out the inaccuracies in the opposing brief that we deem material.

In the brief for plaintiffs in error both the question of title and the question of limitation are brought forward and presented to this court in a substantial re-hash of

the entire case as presented in the Circuit Court of Appeals.

The petition, however, upon which the writ was granted by your Honors, presented but a single question, title by limitation, stated on page 2 of the petition for the writ. The proposition is then advanced (page 6) that "this ruling of the court, in view of the evidence offered by your petitioners, is in direct conflict with the settled line of decisions in this State" (Texas).

This statement is re-asserted on page 17 of the petition for the writ in this language:

"The judgment of the United States Circuit Court of Appeals in this case, which is final, is in conflict with the settled line of decisions in this State, a number of which we have hereinbefore cited and quoted from, and if this judgment is permitted to become a precedent, the title to thousands of acres of land in Southwest Texas which have long been considered to be without question, in view of the decisions of this State, will be placed in jeopardy, and it is of the utmost importance that this question should be passed upon by this Honorable Court of last resort."

Doubtless in reliance upon the correctness of these statements your Honors granted the writ in this case.

We, with all earnestness and seriousness, take emphatic issue with opposing counsel on the accuracy of these statements.

It is to the credit of the learned counsel themselves that in their brief filed before your Honors they have receded from this position, that the action of the lower courts in this case was "*in conflict with the settled line of decisions*" in Texas; and in lieu of such statements we find this:

"The weight of authority in Texas supports our contention." (Brief, p. 43.)

And on page 60 of this brief, under the heading "Summary of Our Claims as to the Statutes of Limitations," this language is used:

"There was evidence sufficient to require the court to submit the case to the jury and a verdict would have been justified by the evidence, from which each of the following conclusions of law would have followed, viz.:" etc.

While it is argued in this brief of plaintiffs in error that "the weight of authority in Texas supports our contention," we fail to note that counsel have asserted to this Honorable Court the gravamen of their case presented in the petition for the writ, wherein it is boldly asserted not that the "weight of authority in Texas" is in their favor, but that the conclusions reached in all of the courts below were "in conflict with the settled line of decisions" in Texas.

We desire at the outset to say that in our view not only are the conclusions reached by the trial court and the Circuit Court of Appeals not in conflict with the settled rule of decisions in Texas, but that they are supported and sustained by them.

Not only so, but we assert here that these conclusions by the courts below are supported by an unbroken line of decisions in Texas.

We shall endeavor to convince this Honorable Court that we read the cases correctly in this respect by an analysis of them in a subsequent portion of this brief.

How the "Question Involved" Is Raised as a Matter of Law by the Record Here Presented.

Before going into "an appreciation of all the facts and admissible inferences in the particular case for the pur-

pose of determining whether there were matters for the consideration of the jury" (Great Northern R'y Co. v. Knapp, 240 U. S., 466), we think it not inappropriate to call attention to the manner in which the effort is made to impeach the judgment of the courts below by pointing out errors here not predicated upon a record of facts purporting to be "all the evidence," or upon seasonable objections and exceptions presented to the lower court as the basis for review here.

The confidence we entertain in the merits of this case induces us to forego detailed consideration of the legal insufficiency as matters of practice and procedure of the errors assigned, and to answer on the merits our adversaries on the propositions they have advanced.

We will briefly indicate, however, the reasons why the "question involved" is not raised in accordance with the rules and decisions of this court. They are these:

(1) *The record presented does not purport to show that the evidence contained therein is all the evidence that was given on the trial.*

Therefore, under this court's rule laid down in *U. S. v. Copper Min. Co.*, 185 U. S., 497: "A judgment entered on the verdict of a jury will not be reversed by the Supreme Court of the United States on writ of error upon the ground that there is absolutely no evidence to sustain it." And, *per contra*, that the court should not have directed a verdict.

The record here only purports to bring up a part of the evidence. The concluding statement by the judge who signed the bill is:

"This concluded the testimony, and the foregoing constitutes all the testimony in the case affecting the

parties and their privies suing out the writ of error."
(R., 118.)

(There were many other defendants in the court below.)

This means only that *in the opinion of the trial judge* "the foregoing constitutes *all the testimony* in the case affecting the parties and their privies suing out the writ of error." It can by no means be construed to be that it "is all the evidence that was given on the trial." (185 U. S., 497.) It does not purport to bring up all the evidence "affecting" this defendant in error. That such a record is not sufficient for a review of this kind was also substantially held in *T. & P. R'y Co. v. Cox*, 145 U. S., 593.

(2) *The complaint is that the trial judge erred in not submitting the case to the jury.*

The following language appears in plaintiffs in error's brief upon which the case was heard in the Circuit Court of Appeals:

"A peremptory instruction by the trial judge is what we are asking this court to revise." (P. 216.)

That is the substance and point of the argument in the brief filed here.

Now, the trial court delivered a charge to the jury covering nearly two pages of the printed record (53-4), which is a summary of all the facts brought in review by him which he deemed material to consider, resulting in a direction to the jury to find for the present defendant in error 488.8 acres, and for the present plaintiffs in error, and some other original defendants, who are not parties to this writ of error, the remainder of the 1280-acre tract under their several pleas of limitations.

To all of which charge, covering the details of a very

complicated case, the result of minute calculations and appreciation of the evidence, *the following exception alone was reserved, to wit:*

"At the time the said charge and instruction quoted above was given by the court to the jury, the defendants and each of them in the presence of the jury, and before the jury had considered or returned their verdict, duly excepted to such portion of said charge and instruction." (R., 129-130.)

Out of this general exception, assignments of error have been evolved seeking to impute to the trial judge an error of law to this effect: *that he should have submitted the cause to the jury, and not directed a verdict.*

This Honorable Court, in *Hanson v. Boyd*, 161 U. S., 397, following a rule of the court long established that a general exception is not sufficient, said:

"And the assignments of error cannot be availed of to import questions into the record in the absence of an exception which directs the attention of the court to the particular portion of the charge objected to."

To the same effect: *Beaver v. Taylor*, 93 U. S., 46-55; *Holder v. United States*, 150 U. S., 92; *Houston Oil Co. v. Hughes*, 219 Fed., 1022.

It does not appear in this record that an exception was taken to the charge of the court in directing the verdict upon the ground that the court should have submitted the case to the jury on an issue of limitations. And yet that is put up to this Honorable Court as the "question involved," and the only question specified in the petition for the writ, and the chief question argued in the brief filed by the plaintiffs in error in this court.

It is therefore apparent that error is sought to be here

predicated upon a record of facts without the presence of a specific exception in the trial court as the basis for reversing the judgment below.

How can plaintiffs in error complain in this court that the trial judge erred in not submitting the case to the jury when they presented no such objection to the trial judge, and took no such exception as the basis for this complaint?

It is not contended by plaintiffs in error in their brief here that the trial judge should have directed a verdict for them. Their contention is stated on page 60, to this effect:

"There was evidence sufficient to require the court to submit the case to the jury, and a verdict would have been justified by the evidence"—in their favor on the limitation pleas.

With commendable candor the learned counsel, on page 11 of their brief, concede that they made no request of the trial judge to submit the case to the jury, or excepted to his refusal so to do, but, on the contrary, that they requested peremptory directions by the following language:

"At the close of the evidence the defendants requested the court to submit the issues of fact to the jury upon questions of fact set forth in a number of proposed special charges. These charges were framed upon the theory that on the undisputed proof the court should have directed the jury to find that the plaintiff had failed to show that it had any legal title to any portion of the Sam Houston survey, and that even if the proof showed that the plaintiff had such legal title, it had been lost, and had become vested in the defendants in accordance with the extent of their several claims, by adverse possession under the several statutes of limitation of the State of Texas."

We submit that a litigant cannot frame his charges and requests upon one theory in the court below which, on appeal, is conceded not to be correct as matter of law, and secure from a reviewing court a reversal of the judgment by adopting in the appellate court *arguendo* another theory at variance with that upon which he rested his complaint below.

That is what plaintiffs in error are confessedly seeking to do at the hands of this Honorable Court.

We shall show *infra* in specific treatment of the special charges asked that *it would have been reversible error at all events had the lower court granted the requested charges.*

But it is sufficient here to indicate that opposing counsel concede in their brief before your Honors that they had framed their requests in the special charges asked "upon theory that on the undisputed proof the court should have directed the jury" to find a verdict for them, although now and here conceding that it is a question, not for the direction of the court, but that "there was evidence sufficient to require the court to submit the case to the jury, and a verdict would have been justified by the evidence" on their pleas of limitation.

Therefore, assuming for the sake of argument that this Honorable Court can review the sufficiency of the evidence to sustain the directed verdict (a) without the predicate of a bill of exceptions purporting to bring up "all the evidence adduced upon the trial," and (b) without the predicate of specific exception raising the point now urged in this court, and (c) upon the admission of the plaintiffs in error that their requests to the trial judge were at variance with the theory upon which they now seek to reverse the judgment below—we lay down in answer to

the contentions of the plaintiffs in error the following propositions of law:

I.

First Counter-Proposition.

(In Reply to the Plaintiffs in Error's Summary of Claims
as to the Statutes of Limitations, Covering
the First 60 Pages of Their Brief.)

There was no such adverse possession under any of the statutes of limitations of Texas established by the evidence as entitled the plaintiffs in error to defeat the recovery by the defendant in error of the 488.8 acres of the land in controversy, and therefore the judgment below is not in conflict with the settled law of Texas.

Statement.

An inspection of the Exhibits A and B in the record discloses that over 100,000 acres of land were by certain artificial barriers, in connection with the natural barriers, enclosed as a cattle ranch.

As stated by the trial court (and the statement is unexcepted to), 14 miles of the front of this territory was bounded by the Corpus Christi and Nueces Bays on the south and east, and by several miles of the Chiltipin Creek, unfenced from Coleman's Ranch to where it empties into the bay, on the north. Wire fences were run from one portion of the bay to Chiltipin Creek, cutting off a portion of the Houston survey, and leaving it in what is known as the Cruz Pasture, the remainder (being a portion of the land recovered by the defendant in error) remaining in that territory bounded on the north by Chiltipin Creek, and on the south by Nueces and Corpus Christi Bays.

In the portion known as the Cruz Pasture, which had no bay front and which was made by connecting wire fences with Chiltipin Creek and adjacent land owners, is the capital city of the County of San Patricio, a place called Sinton, where "several thousand people live." (R., 103.)

There is a courthouse there, banks, hotels, stores, railroads and depots, public highways, in short, the chief city of that political subdivision of the State of Texas known as San Patricio County.

But what about the 100,000 acres upon which on the south there are 14 miles of Corpus Christi and Nueces Bays, and on the north some 23 miles of Chiltipin Creek, forming portions of the boundary of that domain (R., 97, 98, 99), in connection with a wire fence strung from Chiltipin Creek on the north to what is called the Doyle Water Hole on the south, and another wire fence dividing this pasture from the Cruz Pasture running from Chiltipin Creek on the north to the bay on the south?

The evidence indicates that these natural and artificial boundaries enclose vast territory, and were reasonably sufficient to keep the 40,000 head, more or less, of the Colman-Fulton Pasture Company's livestock from straying to other limits of the southwestern domain of Texas. There were however, "stray cattle" in there, belonging to other people. (R., 101-102.)

It does not appear from this record that all the sundry surveys, lots and tracts of land which happen to fall within these boundaries, natural and artificial, were claimed and owned by the pasture company. In fact, when this enclosure was made, this land was public domain, the patent not having issued to the Houston heirs until June 22nd, 1874. (R., 65.) The record does show that there

were three towns sharing in the occupancy of this domain, not fenced off or separated from it or from themselves, where there were railroads and appurtenances, public highways, banks and mercantile establishments, where "a great many people lived"; one was the town of Portland, another the town of Gregory, another the town of Taft. (R., 103.)

So far as the record discloses, the bankers, the merchants, the farmers, the railroad men, the municipal officers, the city and county officials, were in quite as exclusive possession, use, cultivation and enjoyment of the land in controversy as Coleman, Mathis & Fulton and the Coleman-Fulton Pasture Company, unless the ownership of branded cattle which roamed over the prairie and grazed on the native grass conferred upon the latter a claim of greater dignity.

Juan Cruz, one of the cowboys, swore that from 1874 to 1878 "I lived in it (the 'house' on this land) with my father and two sisters." (R., 105.) There is no proof that this family were living there as tenants of the pasture company.

The record also shows that a Mexican named Musces, and another Mexican named Benevides, and another Mexican named Condevario, and two others, named Gonzales and Bantez, occupied a hut at sundry times on the Houston survey. Some of these Mexicans at some indefinite periods "worked for" Coleman, Mathis & Fulton and the Coleman-Fulton Pasture Company, and some did not. (R., 103-105.)

The record affirmatively shows that some of them were there "on their own hook." One of the plaintiffs in error's witnesses, Juan Flores, testified thus:

"In 1884 Perfecto Musces lived in that house. He was not working for anybody." (R., 106.)

He further said:

"Perfecto Musces in one (house), and San Bantez was out there. They were both very old men, and did not do much work. Nobody lived there then except these two old men. I think they were there three or four years." (R., 106.)

This same witness further said:

"After these two old Mexicans left there nobody lived in these houses." (R., 106.)

Other evidence in the record shows that this was a kind of annual branding camp, some say a headquarters camp for rounding up and branding cattle, where there were one or two pens so near the south line of the Houston survey that the line ran through the pens. (R., 88, mid.)

Those fragile "improvements" were bare encroachments over the south boundary line of the Houston survey. (Brackin v. Jones, 63 Texas, 184; Tucker v. Smith, 58 Texas, 482.)

That these were of no consequence as affecting the 'question involved' is so well settled by Texas decisions (Sellman v. Hardin, 58 Texas, 86; Nona Mills Co. v. Wright, 101 Texas, 14) that the opposing brief seems to concede it, for we have this language (pages 27-28):

"Under the law of Texas the grazing of cattle over land does not constitute possession within the meaning of the statutes of limitations, unless accompanied by proof of a sufficient enclosure or of some other act of dominion. *It was on the specific ground that there was no proof of such enclosure that this case was decided against the plaintiffs in error both by the trial court and by the Circuit Court of Appeals, and the controversy is thus reduced to the question whether*

Nueces Bay was such a barrier as to constitute an enclosure for the purposes of the statutes of limitations."

Counsel seem to overestimate the importance of this one item.

This was said in *Polk v. Beaumont Pasture Co.*, 64 S. W., 58, on a similar state of facts:

"If appellees had enclosed the entire pasture by artificial barriers, it may well be doubted whether the dominion and control shown by the evidence to have been exercised by them over said enclosure would be sufficient to establish such exclusive possession and control of said pasture as would render appellees' possession of the land situated therein 'adverse possession,' as that term is used and defined in the statute."

Argument and Review of Decisions.

(Applicable to the Essentials Prerequisite to Title by the Texas Statutes of Limitations.)

(A) First Point of Law.

(Relating to the Question of Exclusive Possession Under The Natural and Artificial Boundaries of the Pasture.)

To acquire title by adverse possession it is essential that the occupation of the premises claimed must be actual and exclusive.

In the case of *Wiley v. Bargman*, 90 S. W., 1116, a decision by the Court of Civil Appeals, approved by the Supreme Court of the State of Texas, it is held:

"That there was no adverse possession for a period of ten years or any period held by the said Wiley through tenants or otherwise; that there was no exclusive possession of said lot of land in suit held by either the said Refugio Navarette or the said

Avaristo Avillar, living with her, during any part of the period of which they lived upon said lot, but that their possession of said lot was shared with the said Chacon, and hence not exclusive; * * * that had they been tenants for the full period of ten years, as claimed by him, the undisputed evidence showing that their possession of said lot was not exclusive, but that it was shared in common with Felipe Chacon, who erected buildings and pens upon said lot, and used the same to a greater extent than did the said Avaristo Avillar, or the said Refugio Navarette themselves, and he, the said Chacon, never at any time recognized or was the tenant of Wiley, but, on the contrary, went into possession as the tenant of Jesus Serna. * * *

The court further said:

"There is therefore no *exclusive* possession shown on the part of the said Refugio Navarette or the said Avaristo Avillar which would enable their landlord to claim by limitation through them the said entire lot No. 10. And there being no evidence before the court to show the confines of the property actually occupied by them with their house, the intervener cannot recover upon his claim of title by limitation of ten years."

It was held in this case as matter of law that the claimant who otherwise had sufficiently proved his title under the statute of limitations should not be allowed to recover. In other words, wanting in the essential of *exclusive* possession and occupancy, his claim failed, notwithstanding all other essentials of the statute had been met and complied with.

In the case of *Richards v. Smith*, 67 Texas, 612, the Supreme Court of Texas thus re-affirmed the law:

"To give title by limitation there must be an adverse claim, and *exclusive* occupation of the thing

for the length of time and under the circumstances prescribed by the statute.

"The adverse claim may be manifest by the facts which will not amount to an exclusive possession, while an exclusive possession may be such as to be sufficient evidence of an adverse claim."

The court further says:

"The facts must clearly show the adverse claim, open in its nature, as well as an exclusive possession of which an enclosure, substantial and permanent in character, accompanied with such use as the land is adapted to, is often the most satisfactory evidence.

"When the acts done upon a tract of land are such as to give unequivocal notice to all persons of a claim to it, adverse to the claim of all others, and this is accompanied by an *actual possession exclusive in its character*, then limitation will run in favor of the person so asserting adverse claim and *enjoying an exclusive possession from the time such exclusive occupancy began.* * * *"

"In the case before us there is *no evidence of an exclusive possession* by the appellant for a period continuing for five years before the institution of the suit."

It was thus decided as matter of law by the highest court in Texas that even though all the other prerequisites of the statute had been complied with, such as a recorded deed to the land, concurrent payment of taxes as they became due, use, cultivation and enjoyment of the land under the terms prescribed by the statute; nevertheless, *because there was no exclusive use and occupation of the land*, the plea wholly failed to be sustained.

In a recent Texas case styled *Harding v. Wanslee*, 197 S. W., 1033 (decided October 10th, 1917), this language is used:

"In order to sustain the plea of limitation, it is

not only necessary that the party relying thereon should show that he was in possession of the land in controversy, but it *must also be shown that he was in exclusive possession of the premises.*"

But this question is so thoroughly well settled in Texas that we deem it unnecessary to refer to further decisions on the point.

This Honorable Court itself, in the case of *Ward v. Cochran*, 150 U. S., 597, in construing the ten years statute of limitations of the State of Nebraska, almost identical in its terms with the Texas statute on the same subject, reversed the judgment of the lower court, because the instructions upon which the jury had found the verdict sustaining the plea of adverse possession had failed to include this essential prerequisite of *actual and exclusive possession*; and because the special verdict which was returned failed to affirmatively find "that the possession on which the defendant relied was *actual and exclusive.*"

Mr. Justice Shiras delivered the opinion of this court, and after reviewing decisions of the various State Courts which laid down this principle as an essential feature of title by adverse possession, said:

"Tested by these definitions, it is obvious that if the title relied on in this case by the defendants below was fully described and characterized by the special verdict, it was defective in two very essential particulars, in that it was not found to have been *actual and exclusive*. *A possession not actual, but constructive; not exclusive, but in participation with the owner or others, falls far short of that kind of adverse possession which deprives the true owner of his title.*"

This Honorable Court then held that as matter of law,

because the special verdict was deficient in the particulars stated, it was insufficient to support the judgment rendered on it.

Nor was the argument effective, addressed to this court in that case, that the presumption should be indulged that the defect was supplied; the language is:

"In the present case, even if the verdict was regarded as a general one, and therefore entitled to be supported by the presumption that sufficient facts exist to sustain it, yet we should feel constrained to reverse the judgment, because of the errors complained of in the eighth, ninth and tenth assignments.

"The plaintiff's counsel requested the court to charge the jury that, in order that possession of land may overcome the title of the true owner, 'there must be a concurrence of the following elements: Such possession must be actual, hostile, exclusive, open, notorious and continuous for the whole period of ten years. Every element in this enumeration is absolutely essential, and if one of these elements does not exist, there can be no adverse title acquired'; and the court did so charge; but the court then proceeded to say that, after having disposed of the written instructions, 'I propose to go outside of what is there stated, and give one on my own motion.' Those voluntary instructions given by the learned judge, though correct in most respects, were imperfect in the very particulars in which we have found the special verdict defective. The jury were not told that, to make out the defense, the possession, in addition to certain other features properly specified, *must be shown to have been actual and exclusive.*"

An inspection of the case just cited is convincing that this Honorable Court, in harmony with the same rule prevailing in Texas, has established the vital essential to the acquisition of title by adverse possession under the statutes of limitation, not only of a possession taken and

held in accordance with the other prerequisites of the law, but that such possession must be "*actual and exclusive.*" Failing in these essentials, the true owner is not deprived of his title to the land.

With four towns and villages, with the county seat of the County of San Patricio, with public highways and two railroads, with banks, mercantile establishments and thousands of people sharing in the enclosure formed by the Coleman-Fulton Pasture Company's wire fences, in conjunction with the Corpus Christi and Nueces Bays on the south, and the Chiltipin Creek on the north, in a domain of 100,000 acres of land over which the cattle company ranged its herds of cattle, with roving Mexicans actually living upon this land on their own account, and unconnected, so far as the record shows, with this pasture company, at least as affecting tenancy of this land, we submit that the possession of that company as matter of law did not meet the requirements of any of the statutes of limitations of the State of Texas as construed by the courts of last resort in that State, and by the Supreme Court of the United States.

If the mere fact that the Houston survey was in the limits of these boundaries enclosed by the water and these fences, without regard to the pedal possession of the land in controversy, gave that company a requisite, adverse, actual and exclusive possession of this land so as to toll the title from the true owners, *then by the same process of reasoning the same company had adverse possession of every vacant lot in the City of Sinton, in the town of Portland, in the town of Gregory, and in the town of Taft*—a proposition abhorrent to reason, and one unsupported by any decision of any court in Texas.

(B) Second Point of Law.

(Relating to the Legal Sufficiency of the Possession Claimed by Virtue of the Natural and Artificial Boundaries.)

Apart from the actual and exclusive pedal possession of this land, the fact that it was within that domain of 100,000 acres enclosing a territory sufficient to retain cattle, such possession was not sufficient as matter of law to meet the requirements of the five or ten years statutes of limitations.

Argument and Review of Decisions.

On page 6 of the petition for *certiorari* is this language:

"Your petitioners aver that the present case is one in which it is proper to issue a writ of *certiorari* for the reason that the Circuit Court of Appeals, by its decision in affirming the judgment of the lower court, has held as a matter of law that when an enclosure is relied upon to establish adverse possession in support of a title by limitation, such enclosure cannot consist partly of natural and partly of artificial barriers, which holding is in direct conflict with the settled line of decisions of this State."

The same proposition is substantially asserted on page 2 of the brief and argument in support of said petition.

As above noted, the present brief for petitioners has changed this contention by asserting that "the weight of authority in Texas" supports their contention that such facts constituted sufficient possession.

The trial judge conceived that the rule announced in *Hyde v. McFaddin*, 140 Fed., 433, following *Polk v. Beaumont Pasture Company*, 64 S. W., 58, and *Vineyard v. Brundette*, 42 S. W., 232, supported the view entertained

by the lower court that these facts did not meet the requirements of the statutes.

Beginning on page 29, and extending to page 43 of plaintiffs in error's brief, is a discussion of the case in its relation to the three cases last referred to.

Keeping in view the facts of this record, we submit that the effort there made to differentiate the present case from those cases fails. True, the cases are all different in their details, but the substantial principles involved are the same. The most that can be contended by the opposing counsel here is that in some features the facts in one case are stronger than another, but we conceive that the facts of the case at bar upon the whole fall short of the probative force and effect of the evidence upon which the decisions in *Hyde v. McFaddin*, *Polk v. Beaumont Pasture Company*, and *Vineyard v. Brundette*, rest.

At any rate, and without attempting an extended review of those cases, it is submitted that so far as this Honorable Court is concerned, the words of Mr. Justice Hughes, in *Great Northern R. Co. v. Knapp*, 240 U. S., 455, should be made to apply. It is there said:

"The case, then, is one in which there is no question as to the interpretation of any provision of the Federal Act, or as to the definition of legal principle in its application, but *simply involves an appreciation of all the facts and admissible inferences in the particular case for the purpose of determining whether there were matters for the consideration of the jury.* The State Courts, trial and appellate, held that there were. Having regard to the appropriate exercise of the jurisdiction of this court, we should not disturb the decision upon a question of this sort unless error is palpable. The present case is not of this exceptional character, and we confine ourselves to an announcement of our conclusion. *Seaboard Air Line R. Co. v. Padgett*, 236 U. S., 668, 673, 59 L. Ed., 777,

781, 35 Sup. Ct. Rep., 481; Seaboard Air Line R. Co. v. Koennecke, 239 U. S., 352, 355, *ante*, 324, 327, 36 Sup. Ct. Rep., 126." (Judgment affirmed.)

It is not conceived that this Honorable Court is appropriately called upon to enter into a minute *review of comparative facts* to ascertain whether or not the lower courts were justified in following the decisions above referred to.

In the case of *Railway Co. v. King*, 222 U. S., 224, it is indicated clearly in an opinion by Chief Justice White that such is not the duty of this Honorable Court. It is there said:

"That while the contentions, from an ultimate point of view, present a question of law—that is:—*Was there any substantial evidence to go to the jury?*—in their primary aspect they call for an examination of the entire evidence to determine whether it had any substantial tendency to establish the right of the plaintiff to recover. Third: That although we have jurisdiction to review, because the cause of action, as stated in the pleadings, rested upon the safety appliance law, the questions now presented, in a broad sense, are of a character which ordinarily it was the purpose of the judiciary act of 1891 (26 Stat. at L., 826, chap. 517, U. S. Comp. Stat. 1901, p. 488) to submit to the final jurisdiction of the Circuit Court of Appeals.

"Under the conditions just stated, we do not think we are called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw therefrom inferences which may possibly conflict with the conclusion of the courts below as to the tendencies of the proof."

(C) Third Point of Law.

The "weight of authority in Texas" is not against the conclusion of the courts below.

Argument and Decisions Reviewed.

We will review *seriatim* the decisions which have been designated in the petition for *certiorari* (p. 6), with which it is averred that the case at bar is "in direct conflict," and which in the brief for petitioners herein filed, are alleged to sustain petitioners' contention by the "weight of authority." (P. 43.)

Dunn v. Taylor, 102 Texas, 80 (94 S. W., 347, 107 S. W., 952, 143 S. W., 311, 147 S. W., 287, 193 S. W., 663, Sup. Ct.).

This case was three times before the Court of Civil Appeals, and twice before the Supreme Court.

The final decision resulted adversely to the limitation claim which was the chief question involved in the litigation. (193 S. W., 663.)

The facts were briefly these:

Taylor brought suit against Dunn, and Tackaberry intervened in the suit, and made a common fight with Dunn by way of cross-action against the plaintiff Taylor, who claimed against the Tackaberry legal title asserted by him as an intervening plaintiff; his adversaries claimed under the five and ten years statutes of limitations. The limitation defenses were upheld in the lower court, and the case was affirmed in the Court of Civil Appeals. The Supreme Court of Texas granted a writ of error, and reversed the decision of the Court of Civil Appeals. (102 Tex., 80.)

The land consisted of 640 acres patented to one Cummings, and had for its western boundary the Nueces River.

For many years it had been enclosed by one Robert Hall in a pasture used for grazing horses "on three sides by a fence, and on the fourth by the river, with the banks of which the fence connected at both ends. This

enclosure is called the Bob Hall Pasture. Hall made no claim to the land, and finally sold his improvements to one G. W. Cavender. On the 12th day of July, 1882, one F. M. McCaleb executed to Cavender a deed for the Cummings tract, which was recorded July 18th, 1882. The defendants connected themselves with this conveyance by deeds as follows:" (here follows the long chain of title, consisting of twelve transfers.)

"The evidence of the different possessions, as well as it can be gathered from the very indefinite and confusing testimony of the witnesses, may be condensed as follows," says the Supreme Court, in reviewing the case.

Without quoting the somewhat long and complicated facts which that court then states, we will say that from 1882, beginning with ~~Cummings~~ ^{Cavender}, and running down through his successive transferees, it appears that the land thus taken possession of was used as a pasture by the successive claimants, under recorded deeds, with payment of taxes. The court, in stating this evidence, points out the indefinite and confused testimony of the witnesses, especially with reference to the successive tenancies and continuity.

Upon such record the judgments of the trial court and the Court of Civil Appeals were reversed and the cause remanded for a new trial.

Associate Justice Williams, for the Supreme Court, wrote the opinion, and the following are applicable statements of the law as declared in the case:

"It seems plain that no continuous and unbroken possession for ten years was shown affirmatively.
 * * * The burden was on the defendants to prove every fact essential to their defense. Relying on the occupancy of successive possessors, they were bound

to show that such occupancy was continuous and unbroken. (*Overand v. Menczer*, 83 Texas, 122; *Phillipson v. Flynn*, 83 Texas, 584.) Admitting that breaks occurred, they are not in a position to ask the courts to assume that such breaks were of so short duration as not to defeat the continuity of the possession. It was incumbent on them to show the facts from which the conclusion of continuity may be deduced affirmatively. But we think the evidence affirmatively indicates, at least, that there were intervals between the possession of Thornton and Prenall and Blocker, and between those of the latter and of Cavender, which were too great to be disregarded as the reasonable time allowed by the law for changes of occupants. No decision of this court has ever held to be immaterial such lapses of possession as this evidence indicates. It was improper for the court to submit, as it did, to the jury the question as to reasonableness of the time."

The court further said:

"The land, it is true, was enclosed, but *enclosure without use is not sufficient*. The statute requires the cultivation, use or enjoyment of the land, and this is essential to the actual and visible appropriation, which constitutes adverse possession. The necessity for this continuous use of the land is not affected by difficulty in getting tenants. He who would acquire the land of another by limitation must perform the conditions under which the law permits him to do so."

After further discussion of this subject, the court passes to consideration of the other requisites under the five years statute, and says:

"We think it equally clear that the facts do not sustain the claim under the five years statute. No continuous payment of taxes was shown for the period of five years prior to 1893."

And passing on this subject is the next observation:

"The statement given of the deeds under which defendants claim shows that at no time after Cavender last entered did anyone hold under a deed duly registered for as much as five years. The conveyance from M. T. Taylor to J. C. Taylor vested the title in the latter Sept. 19, 1899, less than five years after Cavender's last entry, and thereafter the holding must have been under it. There was therefore no possession under a recorded deed from that date until October 26th, 1900, when the deed was recorded, more than a year after it was executed, so far as the record shows. Because of this interval in the registration of deeds, the possession after October 26th, 1900, cannot for the purpose of five years' limitation be connected with prior possessions, and five years did not elapse between that date and the interruption of limitation by suit."

For these reasons the Supreme Court reversed the judgments of the courts below in that case, and whatever else is said in the opinion is, of course, *obiter dicta*. Such *dicta*, however, if considered as authoritative adjudication of the law (which it of course cannot be so considered), nevertheless militate in no respect against the position taken by us in the case at bar.

Opposing counsel, however, have taken a *dictum* out of the decision, and quoted it with emphasis in their brief (p. 45), as if that voluntary statement of the judge who wrote the opinion were the point upon which *Dunn v. Taylor* had been decided. That statement is as follows:

"As we have stated, we agree with the Court of Civil Appeals that the enclosure by the fence and the river was sufficient, when the land was in actual use, to show such an appropriation of it as would sustain the defense of limitation if such use was continuous. This, however, is subject to the operation of Art. 3346, Revised Statutes, on the claim of ten years limitation, which is discussed further on. * * *

Evidence that the Nueces River was generally used above and below the Bob Hall Pasture as a barrier for pastures was admissible, for the reason that such general use of it would indicate to the owners of land that it was thus appropriated and used by others. The mere fact that the river was not a perfect barrier against stock would not be conclusive against the claim of the possessor."

These last sentences, purely *obiter dicta*, are seized upon by counsel for plaintiffs in error as authority for their contention that the case at bar, as ruled by the courts below, is in conflict with *Dunn v. Taylor*.

The fallacy of this position is apparent, and the facts of the two cases have no reasonable analogy to each other.

Such possession as was had in that case by the claimants of the Cumings survey *was exclusive of all others*.

In reversing and remanding that case, Judge Williams said:

"The evidence upon another trial may differ materially from that in the record. From what we have said it follows that the court should direct a verdict for the plaintiffs (the record owners) for the land, unless there is fuller evidence on the question of limitation than that in the record."

The successive trials and successive appeals of that case need not be re-hashed here. Suffice it to say that the end of the case resulted in the failure of the limitation defenses.

Such, then, if your Honors please, constitutes the chief decision relied upon by the plaintiffs in error in their assault upon the conclusions of the courts below in the instant case.

Frazier v. Sereau, 128 S. W., 649.

This case, by the intermediate appellate court at San Antonio, was not acted upon by the Supreme Court of Texas, but a writ of error was dismissed on June 22nd, 1910. In no event therefore could it be considered authoritative.

However, the question to which counsel at bar have cited this case was not the question upon which it was decided. The following statement by Judge Niell in that case indicates the question upon which it hinged and was decided (128 S. W., 651):

"The conclusions of law reached by the trial court on the facts found were 'that the plaintiff having shown prior possession of the land in controversy to that under which the defendants claim, and a claim by Phillips and use and enjoyment by him through a tenant, and a regular chain of title connecting herself with such possession, and the defendants having shown no title in themselves, or either of them, is entitled to recover, and that judgment should be in her favor for the land sued for.' "

It is apparent from an inspection of the case that the decision rested not upon a question of legal title on the one side and an adverse limitation claim on the other, although that is the question which learned counsel have cited the case to sustain. *The decision is purely and simply based upon the effect of prior possession as giving recoverable right against a naked trespasser.*

Loring v. Jackson, 95 S. W., 19.

This, also, was a case not by the highest Texas Court, but by an intermediate appellate court, at Galveston. The decision is based upon these facts:

Mrs. Loring brought a suit against Jackson to recover the Boden league, in Chambers County. She offered a

deed purporting to be from the heirs of the original grantee of the land to her predecessor in title. Jackson held under a deed (insufficiently recorded to give constructive notice) from the original grantee to one Caldwell. Mrs. Loring claimed as innocent purchaser against Jackson's deed, and Jackson attacked her deed as a forgery. And in addition to this, Jackson plead the three, five and ten years statutes of limitations. It thus appears that both parties were claiming under an apparent legal title, Mrs. Loring from the heirs of the original grantee, and Jackson by mesne conveyances from the original grantee. The case was tried by the lower court without a jury upon two issues, first, whether the plaintiff, Loring, established a legal title, to do which she had to show the genuineness of her own deed, and innocent purchaser against Jackson's deed. The trial court held the deed from the heirs of the original grantee under which Mrs. Loring was asserting title was a forgery. That, of course, disposed of her claim that she was an innocent purchaser against Jackson's older and superior deed.

The trial court also held (which was entirely unnecessary to the decision in the case) that Jackson, under his plea of limitations, had title by adverse possession; that the proof showed that in connection with the natural and artificial boundaries that he had exclusive possession, use and occupation of the land under his claim of title from the original grantee.

The case on appeal was affirmed by the Galveston Court of Civil Appeals.

After reviewing the facts on the question of forgery, the following language in the opinion is decisive of the case:

"It is claimed by the appellees that the certified

copy of the deed to Martin (Mrs. Loring's remote grantor) is a forgery; that is, that the original was not in fact entered upon the records of Liberty County. The only evidence of this, so far as disclosed by the record, is the difference in the size of the impress of the seal on this and on other instruments proven to be genuine are about 1-16 of an inch. If the finding of the court rested upon the assumption that the certified copy was a forgery, we would hold that it is not supported by the evidence; but taking all the evidence in the record tending to cast suspicion upon the deed in question, we are not prepared to say that the finding of the trial court that it is a forgery is so against the weight and preponderance of the evidence as to justify this court in sustaining the assignment of error presenting that question."

(One of the "heirs" who was supposed to have signed the Martin deed in 1857 was proved to have died in 1839—eighteen years before.)

This conclusion, of course, necessarily ended the case. But in deference to appellants' counsel in that suit, the court considered the assignment of error attacking the findings of the lower court in favor of Jackson on his pleas of limitation. It appeared in the evidence that Jackson, under duly recorded deeds, and payment of taxes, had this land fenced up in his pasture (connected by a valid chain of title with the original grantee), enclosed partly by fences and partly by natural boundaries, as indicated on the map on page 23 of the 95th S. W. Reporter.

The trial judge held that the evidence in the case established that "*all of the land (within that enclosure) was either owned or claimed exclusively by the defendants and their ancestors at the time of their taking possession in 1880, or so held under authority from persons*

whose title was recognized by the defendants and their ancestors, and during all the period they were claiming the land in controversy as their own."

The appellate court sustained these findings, and remarked:

"The fence was erected by Jackson, and maintained by him and appellees, his successors in title, for the purpose of enclosing and thus taking exclusive possession adverse to appellants of the land in controversy together with other lands within the enclosure claimed by appellees, and the possession thus taken and maintained was amply sufficient to give notice to appellant of such adverse holding."

As above noted, when it was decided by both the lower and appellate court that Mrs. Loring's claim of title was a forgery, that entitled him to defeat her suit, and therefore judgment for the land without regard to the question of limitations. That is made clear by the opinion of the court in this language:

"If the deed from Pierre and Juan Baptiste Boden to Martin, which is an essential link in appellant's title, be a forgery, this of itself is an effectual bar to her recovery."

And yet this case is pointed out in plaintiffs in error's brief, on page 30, and again on page 45, and again on page 51, and again on page 57, and finally on page 60, as *par excellence* the decisive case with which the lower courts in the matter at bar were in conflict.

Randolph v. Lewis, 163 S. W., 649.

This case involved 369 acres of land in Madison County, and there were two issues presented: The first, whether a deed under which the limitation claimant asserted his title was sufficient in its description, and the second was

whether the facts sustained his plea of limitation of five years.

The appellate court sustained the judgment of the lower court, which resolved both questions in favor of the appellee, the limitation claimant.

The following language is used:

"The court did not err, we think, in finding as a fact that the defendant had used and enjoyed the land for a sufficient length of time, under deed duly registered, as to give him title to the land under the five-year statute of limitation. The evidence showed that the appellee, immediately after purchasing the land, placed his deed upon record, inclosed the land, and had continuously used it for a period of more than 5 years as a pasture for cattle, hogs and goats, paying taxes thereon. Such user is sufficient to show adverse possession. See *Hooper v. Acuff*, 159 S. W., 934. Pasturing cattle on land inclosed for that purpose, and which is under the *exclusive* control of the party claiming under the statute, is such use and enjoyment as is sufficient. (*Hardy Oil Co. v. Burnham*, 124 S. W., 221.)"

It is plain that no such question as that urged upon this Honorable Court was raised or decided in that case.

As will appear in the opinion on motion for re-hearing, the chief question in the case was one of sufficiency of description of the deed in question.

Alley v. Bailey, 47 S. W., 821.

This land, aside from the fact that it was used by the limitation claimant as a pasture exclusively under his dominion and control, and from which he "excluded all other persons," and "lived within the pasture," has no analogy to or bearing upon the case at bar. It was probably cited because of the incident that a part of the enclosure consisted of the Colorado River at a certain point, showing

a sufficient enclosure for the purpose for which the land was used.

The Court of Appeals said:

"The enclosure thus had for one of its sides the Colorado River, which was sufficient to keep cattle in and out, and for another a fence belonging to another party whose consent to this use of this fence there is no direct evidence. It appears, however, that Bailey and Johnson kept their cattle in the pasture which they had thus enclosed, controlling all the lands included in it, and excluding all other persons therefrom. They lived within the pasture, but not on the land in controversy."

They were holding under deeds duly recorded, and paying taxes on the land. The facts narrated, in the opinion of this intermediate appellate court in Texas, were held sufficient to sustain the judgment of the court below in favor of the plea of adverse possession.

Reviewing the facts, the court said:

"It enabled the parties, in short, to control the land, hold the exclusive possession of it, and use it for the purpose to which it was adapted, and the other indications of possession were so prominent as to give the requisite notoriety. We cannot see that any element of adverse possession is wanting."

Such, in brief, are the Texas decisions cited on page 6 of the petition for *certiorari*, and on page 30 of the brief in this court.

Since these are the cases specifically pointed out by the plaintiffs in error as the authorities sustaining their complaint in this Honorable Court, we shall desist from further discussion of the point, and rest the matter upon the above analysis and review thereof.

What has been said applies to both the five and ten years pleas of limitations.

Nevertheless, without going into a recapitulation of the essential facts already referred to, we desire, in response to the specific claims of plaintiffs in error under the five and ten years statutes, to submit the following counter-propositions:

Second Counter-Proposition.

(Applicable to the Plea of the Five Years Statute of Limitations.)

Plaintiffs in error, as to the 448.8 acres awarded to the defendant in error, did not establish the prerequisites of the five years statute of limitations; and therefore the judgment below in this respect is not erroneous.

Statement.

It is not pretended by opposing counsel that this question arises by virtue of any condition of facts occurring prior to *August 30th, 1879, which was the first deed recorded purporting to describe the land in controversy.* (See brief for petitioners, pages 49 *et seq.*) This was a conveyance to T. M. & Y. Coleman. (R., 76.)

The next deed is one dated January 25th, 1881, but not recorded for five and a half months thereafter, to wit, June 11th, 1881, from the two Colemans to the Coleman-Fulton Pasture Company. (R., 76.)

It is apparent therefore that there was a break of nearly six months in the registration of the second deed, which, apart from any other fact, constituted a fatal objection to the five years limitation plea. (See *Dunn v. Taylor*, 102 Texas, 80, and quotations therefrom, *supra*.)

Therefore, the five years plea must begin, if at all, with the recording of the deed to the Coleman-Fulton Pasture Company on *June 11th, 1881*. For, in the language of the Supreme Court, in *Dunn v. Taylor*, this last deed "cannot, for the purpose of five years limitation, be connected with prior possessions."

The next deed is from said pasture company to Dusenbery, dated August 7th, 1908, but not recorded until July 6th, 1909. (R., 81.) Also, another from the same company, dated Sept. 10, 1908, but not recorded until January 27th, 1910. (R., 81.) Then follows Dusenbery's deed to Widergren and Anderson, dated August 7th, 1908, but not recorded until August 4th, 1909. (R., 81.)

It is apparent that the claim of five years limitation therefore must stand or fall under the deed recorded June 11th, 1881. (R., 76.)

(a) *What were the facts of actual and exclusive possession by the Coleman-Fulton Pasture Company under this deed?*

These: The ranging of cattle over the enclosure made by the wire fences, the bays and creek, and the fact that a windmill and stock pens used for branding cattle were located on or near the south boundary line of the Houston survey.

(Such facts are expressly held insufficient in *Sellman v. Hardin*, 58 Texas, 86.)

As shown above, Mexicans unconnected with the Coleman-Fulton Pasture Company, so far as the record shows, were actually living in the house on the Houston survey near the branding pen in 1884, and continued to live there, cultivating a small piece of ground south of the pens, that is, entirely south of the Houston survey,

because the line ran through the pens, and several years thereafter abandoned the place, from which time no one lived there or occupied the premises. (R., 105-106-107.)

It is an established principle of law that the party pleading limitation against the true title cannot prescribe under the statute unless he in person or by his tenant is in the exclusive and continuous, unbroken, actual possession of the land.

Overand v. Menczer, 83 Texas, 129.

Dunn v. Taylor, 102 Texas, 85.

1 Am. & Eng. Encl. L. (2nd Ed.), p. 887.

Abbott's Trial Ev. (2nd Ed.), Sec. 37, p. 905.

Tucker v. Smith, 68 Texas, 481-2.

It is also an established principle of law that the record owner at all times has the constructive possession until that constructive possession is ousted by the adverse claimant taking unto himself the actual and exclusive possession.

Evitts v. Roth, 61 Texas, 85.

Whitehead v. Foley, 28 Texas, 289-290.

Murphy v. Welder, 58 Texas, 240-241.

Craig v. Cartwright, 65 Texas, 421.

Word v. Box, 66 Texas, 602.

The record will be searched in vain for evidence that the Coleman-Fulton Pasture Company itself, or by tenants, ever from the record of the deed in 1881 until its sale to Dusenbery in 1908, was continuously for a period of five years in the actual and exclusive possession of any part of the Houston survey. And when the break occurred in the subsequent years by the failure to record the deeds, the interruption was such as to be fatal to the plea until the next recorded deed and possession, use, occupation and payment of taxes began under it.

Counsel do not contend, however, that there was any five years limitation as to the 488 acres of land recovered by the judgment below under the specific acts of the Coleman-Fulton Pasture Company or its vendees here, but that the plea should have been sustained by reason of the claim of the Coleman-Fulton Pasture Company under its recorded deed beginning June 11th, 1881—or the deed dated in 1879. (See brief for petitioners, page 50.)

It is a presumption of law which must be rebutted by affirmative proof that the Mexicans who were living upon the land, as above noted, were living there in subordination to the title of the true owners, until the contrary is affirmatively shown.

So held in the cases last above noted, and in many other Texas decisions.

It was said by the Supreme Court of Texas in *Holland v. Nance*, 102 Texas, 183:

*"The record of a deed does not constitute possession of the land, and in fact is not notice of possession. * * * Without possession, adverse owners are not charged with notice of the fact that the deed is upon record, or that any claim is made to the land."*

It is therefore apparent that the five years plea of limitation must fail for the want of the essential prerequisites of actual and exclusive possession by the Coleman-Fulton Pasture Company from 1881 to the date of its conveyance of the land in 1908, whereunder some of its vendees acquired a limitation title and itself the subdivision adjudged to it.

(b) *The following is the evidence as to tax payments:*

Without any independent recollection of the payments on the Houston survey, J. C. Fulton (R., 93-97), a book-

keeper of that company, furnished the only evidence, except that hereafter noted, as to the payment of taxes. His statements consist of the assertion that according to the list on the books of the company showing the renditions and payment of taxes, he had paid the taxes concurrently as they became due on this land "*during the time that I was in the employ of the Coleman-Fulton Pasture Company.*" (R., 94.)

He repeats that "*never at any time during the time I worked for Coleman, Mathis & Fulton did the taxes on the Sam Houston survey become delinquent.*" (R., 94.) And he makes the same statement "*during the time that I worked for the partnership of Coleman-Fulton.*" (R., 94.)

As above noted, there was no deed of record as the basis for the five years statute until the assertion of claim made by the Coleman-Fulton Pasture Company. Therefore, what was done preceding that time is immaterial to this issue.

This witness then testified concerning the Coleman-Fulton Pasture Company:

"This list (of taxes) is of the entire property of the property of the Coleman-Fulton Pasture Company, and it dates back to 1882." (R., 94.)

And he says:

"Never at any time during the period beginning in 1880 when I worked for Coleman, Mathis & Fulton, up to the time that I severed my connection in 1902 with the Coleman-Fulton Pasture Company did the taxes on the Sam Houston survey ever become delinquent." (R., 94.)

It will be noted that this witness is careful to state that his testimony covers the time *during which he was work-*

ing for said company, and it is based upon what he finds listed upon the books in his charge.

The definiteness of this proof is destroyed by the fact that he swears that "*there were six or seven years that I was not an employe of the company, during which time I had a factory at Rockport.*" (R., 96.)

There is no proof as to what "*six or seven years*" therefore must be taken out of this witness' tax statements, nor whether his disconnection covered one period or several periods. The burden is upon the limitation claimant to affirmatively prove what years the taxes were paid, and that burden is not met by the general statements that they were paid "*during the time that I worked for the Coleman-Fulton Pasture Company,*" without showing what time that was, even if his statement is sufficient that "*I do not remember the payment of any special taxes on the Houston survey, except that I know it was on the list, and I know that all the taxes were paid.*" (R., 97.)

When the witness' testimony thus given is coupled with his statement that "*there were six or seven years that I was not an employe of the company,*" it leaves the matter of tax payments based upon his testimony entirely too uncertain and fragmentary to meet the specific and direct requirement of the statute in this respect.

The only definite statement, therefore, with reference to the tax statements by the Coleman-Fulton Pasture Company consists of a statement that beginning with the year 1889, down to and including 1907, the taxes were paid concurrently. (R., 117.)

Therefore, the statement of counsel on page 50 of their brief that—

"*Taxes upon the Houston survey were paid in each year from 1872 down to 1909 by Coleman, Mathis &*

Fulton and Coleman & Fulton and the Coleman-Fulton Pasture Company, in succession,"

is inaccurate.

It is apparent, therefore, that the tax payments in compliance with the statute upon which certainty exists, as shown by the record, are the payments indicated in the statement found on page 117 of the Record, "*beginning with the year 1889,*" and there is no concurrent, actual and exclusive possession shown by the record by the Coleman-Fulton Pasture Company in person or by tenants from that time until the sale of its claim in 1908.

It is not shown by the record that the Mexicans living upon the land on their own account, unconnected with any tenancy arrangements under the Coleman-Fulton Pasture Company, were succeeded by this limitation claimant, or any tenant under it.

To make out a case of limitation by the Coleman-Fulton Pasture Company, these facts must be proved. They cannot be presumed, as is expressly decided in:

Wall v. Club Land & Cattle Co., 99 Texas, 591.

Bronson v. Scanlan, 59 Texas, 227.

Hirsch v. Patton, 108 S. W., 1017.

1 Cyc., p. 1001.

Francis v. Holmes, 118 S. W., 883, top.

Lucy v. Tenn., etc., R'y Co., 8 So. Rep., 806.

Finally, the record shows affirmatively that most of the legal title to the land during those years was protected by statutory disabilities on the part of Sam Houston's children. The facts are set forth briefly on pages 57 *et seq.* of brief for petitioners.

So that, during such disabilities, the concurrence of all the prerequisites of the statute in behalf of the Coleman-

Fulton Pasture Company would not mature title in it under the statute of limitations.

It is submitted, therefore, that the court was not in error in refusing the special charge requested to this effect that—

“If you believe from the evidence that the defendants and those under whom they claim have had peaceable and adverse possession of the Sam Houston survey in controversy, cultivating, using and enjoying the same, and paying taxes thereon, and claiming under a deed or deeds duly registered for a period of five consecutive years at any time between the 26th day of August, 1879, and the 30th day of May, 1914, then you should return a verdict for the defendants, unless you find for the plaintiff under other instructions given you.” (R., 133.)

This is one and apparently the chief of the “errors urged upon this appeal.” (Brief for petitioners, pages 14 *et seq.*)

To have given this charge would have been manifest error. Therefore, it cannot be error in the court to have denied the charge.

Third Counter-Proposition.

(In Reply to the Plea of Ten Years Statute of Limitations.)

Plaintiffs in error, as to the 448.8 acres awarded to the defendant in error, did not establish the prerequisites of the ten years statute of limitations; and the judgment below in this respect is not erroneous.

Statement.

What has been said with regard to the facts under the

first and second counter-propositions *supra* is applicable here.

It is practically conceded on page 56 of the opposing brief that the plea for want of certainty cannot be sustained between the years 1882 and the enactment of the restrictive statute of the legislature of Texas on the 27th day of March, 1891 (copied on pages 53 and 54 in brief for petitioners), but the statement is made on page 56 as follows:

“But even if it has to be taken for the purposes of this appeal as doubtful whether the Doyle Water Hole fence was built prior to 1882, the enclosure of the land in controversy was complete for the purpose of the statute of limitations in 1873.”

It is then argued that under the general enclosure for those years, ten years had become complete under the statute.

More than one conclusive answer may be made to this position. This one is sufficient, viz.: that until the 22nd of June, 1874, the land was public domain of the State of Texas. On that date it was segregated by the issuance of the patent “to the heirs of Sam Houston, deceased, their heirs or assigns.” (R., 65.)

Hence, the beginning of the operation of the statute at all events must be with that date, and must continue uninterruptedly with the concurrent prerequisites until June 23rd, 1884.

If this condition had really existed, and all the prerequisites had been complied with, it would have been ineffectual, as to all of those children of General Houston, under the disability of coverture. (R., 66-67.)

It would have likewise been ineffectual because of the disability of minority of Andrew Jackson Houston, who

did not become of age until January 21st, 1875 (R., 66); of William R. Houston, who did not become of age until May 25th, 1879 (R., 66), and of Temple L. Houston, who did not become of age until August 12, 1881. (R., 66.)

And it is therefore perfectly apparent that the plea must be tested by the facts from 1882 to 1891, when the restrictive limitation act passed. This, of course, was less than nine years. There is no pretense of compliance with the terms of this restrictive act of 1891, which provided that to mature such limitation title to the land "one-tenth thereof shall be cultivated and used for agricultural purposes," etc.

No more striking case could be presented illustrative of the conditions intended to be met by the legislature in passing the last named act than the case at bar. It was said by the court in the case of *Howard v. Scolant*, 162 S. W., 979, that it was the purpose of the legislature in passing this act—

"To mitigate to a certain extent the evil of anyone acquiring title by means of such large enclosures that the owners would have difficulty in ascertaining whether their land was enclosed, use made thereof, and the same held adversely, when the only evidence thereof was that a line of fence extended along the same, and stock was permitted to graze thereon."

II.

Fourth Counter-Proposition.

(Pertaining to the Question as to the Legal Title Apart from the Issues of Limitation.)

It was not error in the trial judge to give this charge:

"By reason of the special act of the legislature passed July 22nd, 1870, being 'An Act for the relief of the heirs of General Sam Houston,' and in pur-

suance of the location and survey of the land in question, and patent by the Governor of the State of Texas to the heirs of General Sam Houston, and to their heirs and their assigns, that the legal title to the 1280 acres of land in question is in the plaintiff in this case, and the plaintiff is entitled to recover all of the said 1280 acres of land, less such parts thereof as may have been acquired by one or more of the defendants by reason of the statutes of limitation."

Statement.

The defendants "duly excepted to said portion of said charge and instructions." (R., 129.)

The Circuit Court of Appeals, in passing on the case, said:

"On the evidence shown in the Transcript the legal title to the land in controversy is in the Houston Pasture Company."

The petition for the writ of *certiorari* predicated no error upon the question, but solely upon the action of the courts below on the pleas of limitations. (P. 6.)

The "brief and argument in support of the petition for *certiorari*" is confined to the one question upon which the action of this court was invoked for the granting of the writ, as shown on page 2 of that document, in the following language:

"The question involved and authorities upon which petitioners rely for the granting of said writ of *certiorari* are:

"QUESTION INVOLVED.

"The United States Circuit Court of Appeals erred in holding as a matter of law that an artificial barrier such as the waters of an arm of the Gulf of Mexico cannot be used in connection with good and substantial fences to constitute an enclosure where such enclosure is relied upon to establish adverse possession in support of title by limitation."

This, and none other, in the petition for the writ, and in the brief and argument in support thereof, was presented to this Honorable Court.

We assume that, as stated by Mr. Chief Justice Fuller in delivering the opinion of the court in the case of *Hubbard v. Todd*, 171 U. S., 494, your Honors will confine your "consideration of the case to the examination of errors assigned by the petitioners."

Nevertheless, we do not doubt the power of this court to investigate all questions, however belately raised, in this court by the plaintiffs in error. That the point here under consideration is utterly void of merit, we believe is not seriously debatable.

In lieu therefore of a discussion of this question in this brief, we invite the court's attention to our treatment of it in our brief in the Circuit Court of Appeals (pages 5 to 18), if the court desires to review the point.

It is respectfully submitted that the judgments of the trial court and the Circuit Court of Appeals should be affirmed, with costs.

WILLIAM D. GORDON,

*Attorney for the Houston Pasture Com-
pany, Defendant in Error.*

Of Counsel:

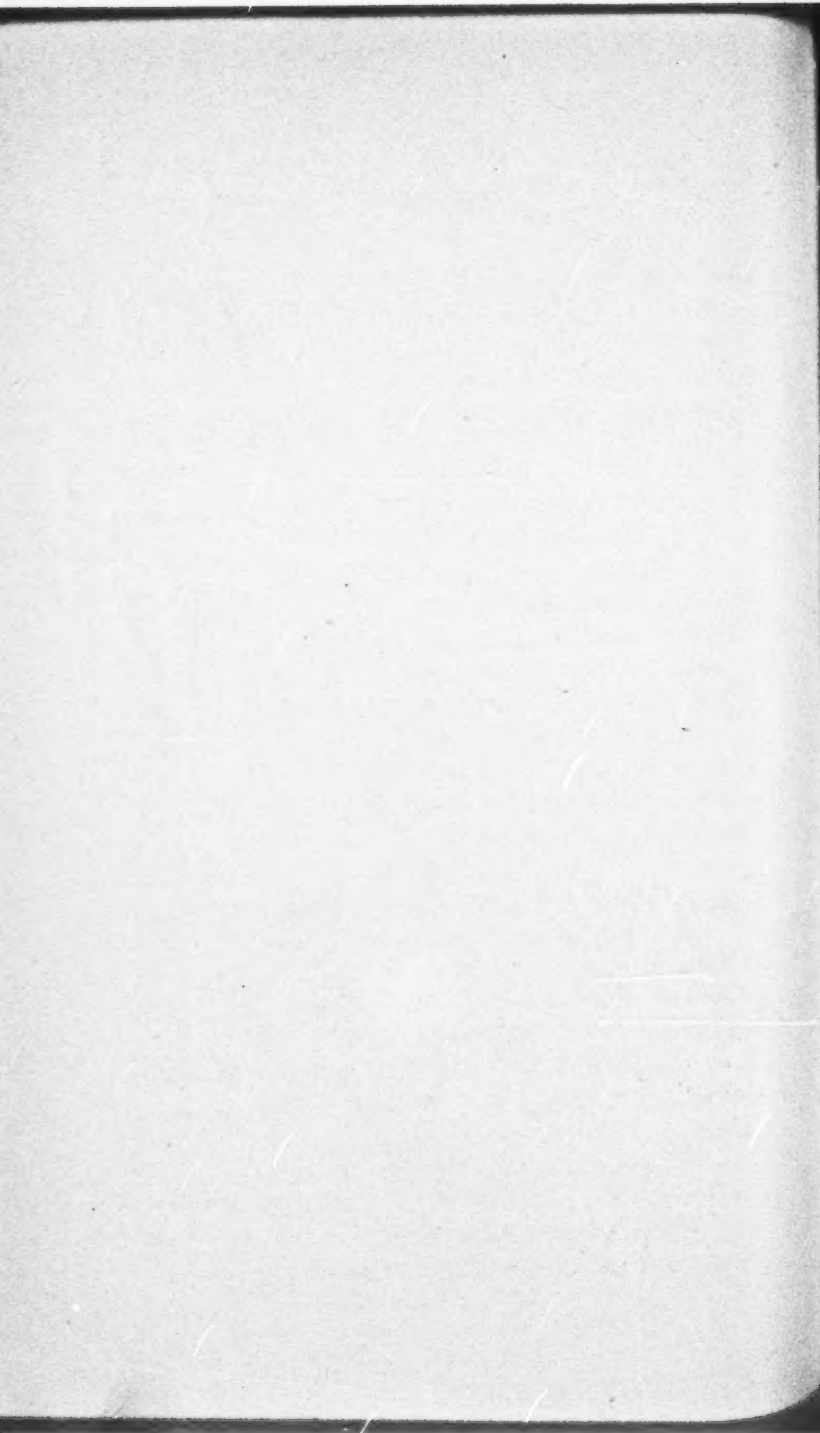
JOSEPH W. BAILEY,
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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1915.

ALICE STATE BANK ET ALS., PETITIONERS,

VS.

HOUSTON PASTURE COMPANY,
RESPONDENT.

**RESPONDENT'S ANSWER TO THE PETITION
OF WRIT FOR CERTIORARI.**

*To the Honorable Chief Justice and Associate Justices
of the United States Supreme Court:*

The respondent, Houston Pasture Company, makes
answer to the petition for writ of certiorari in this cause
as follows:

I.

The petition shows on its face that this is a contro-
versy based upon diversity of citizenship as the only

ground for Federal jurisdiction and involves solely an issue of fact between the litigant parties without the predicate of an appropriate exception raising an issue of law. That question of fact is, whether or not a plea of adverse possession in support of title by limitation was sustained by the evidence in this case.

There are no questions of public importance and gravity involved nor of the uniformity of decisions whereby the Supreme Court should exercise its discretion in a controversy of a purely private nature, to review the decision of the United States Circuit Court of Appeals (Sec. VI Act Mar. 3, 1891; *Lau Ow Bew versus United States*, 144 U. S. 47-58).

The fact that the Taft family are interested in this suit on the one side and the heirs of General Sam Houston of Texas are interested on the other, though interesting as a personal incident, is of no concern, tested by the rule laid down in the above authority and many others which could be cited.

II.

The statement of the case made in the petition for certiorari is by no means accurate. Throughout the entire petition for the writ and in the brief and argument in support thereof we fail to find a single reference to the record supporting the facts asserted, and we deny in this answer that the case has been correctly and accurately stated in the petition for the writ and the brief and

argument supporting the same. We shall, therefore, state correctly the ultimate facts upon which this case was decided in the courts below :

III.

STATEMENT OF THE ISSUES.

The record discloses but two issues litigated in the lower courts :

(1) Did the respondent exhibit a record title to the land in controversy?

(2) Was this record title defeated entirely by the defense of adverse possession under the limitation statutes of the State of Texas?

There is no effort in this court to predicate error upon the first question above stated. The specification of error relied upon is set forth on page 2 of petitioners' brief and argument as the "QUESTION INVOLVED." This is stated as being a question of limitation under an asserted state of facts. Supporting the issue thus defined is a seventeen page brief and argument.

This answer therefore will be concerned with the question thus propounded to this Honorable Court. It is therefore assumed (since no complaint is made of it in this court), that the true title to the land in controversy rests with the respondent, unless entirely defeated by the plea of limitations.

That the question is moot viewed in the light of this record, we shall endeavor to show.

IV.

FIRST POINT.

(In reply to the question involved as propounded in the Petition for Writ of Certiorari.)

"A judgment entered on the verdict of a jury will not be reversed by the Supreme Court of the United States on writ of error upon the ground that there is absolutely no evidence to sustain it where the bill of exceptions does not show that the evidence contained therein is all the evidence that was given on the trial." (*U. S. v. Copper Min. Co.*, 185 U. S. 497.)

FACT STATEMENT.

The bill of exceptions in this case does not purport to contain all the evidence. It begins as follows:

"Be it remembered that upon the trial of the above styled and numbered cause the following testimony was adduced" (then follows documentary evidence and parol testimony, R. 97, ending at 201, which concludes as follows):

"The defendants present the foregoing as their bill of exceptions and pray that the same may be settled, allowed and signed by the judge and made a part of the record as provided by law, which is accordingly done. This 23rd day of July, A. D. 1915. (Signed) W. T. Burns, Judge" (R. 201).

On page 184 of the record this language is used:

"This concluded the testimony and the foregoing constitutes all the testimony in the case affecting the parties and their prizes suing out the writ of error."

The above quoted portions of the record reflect the nature and extent of the evidence as contained in the record. It nowhere appears in the bill of exceptions that *all of the evidence* has been set forth.

AUTHORITIES.

In Rose's Notes, Vol. 1. p. 167, Section 345 (I), it is stated:

"An objection to an instruction on the ground that it is not warranted by the evidence will not prevail or be reviewed where the Bill of Exceptions does not purport to contain all the evidence."
(Citing *Hansen v. Boyd*, 161 U. S. 407; 40 L. 746).

In the Hansen case Syllabus No. 1, reads:

"Where there was a motion to direct a verdict, and both parties therefore agreed to submit the issues of fact to the jury, it must be assumed that there was sufficient evidence to warrant the court in permitting the jury to decide upon the evidence, where the record does not purport to contain all of it."

And Syllabus No. 5, reads:

"When all the evidence is not shown to be contained in the record, it must be assumed that there was evidence in the case tending to support a theory of the case stated by the court."

The trial judge in his charge (R. 82), said:

"The form of verdict has been prepared by counsel, and agreed upon as correctly reflecting the facts as controlled by the court's view of the law, and I will ask that one of your members as foreman, kindly sign the verdict."

COMMENT.

While counsel for petitioners presented for consideration of the Court of Appeals, an extensive brief, the last page thereof is a plain statement of the fundamental ground upon which they seek to obtain a reversal of the judgment. This language is used:

"A peremptory instruction by the trial judge is what we are asking this court to revise."

How can this court revise a peremptory instruction of the trial judge upon a bill of exceptions that does not purport to bring up all the facts upon which that instruction is based?

The direct question is decided by the United States Supreme Court in the case of *U. S. v. Copper Min. Company*, 185 U. S. 497.

The presumption of law is that the judge trying the case was supported by the evidence in the action which he took.

On the same page of their brief plaintiffs in error use this language:

"If defendants' record title was not superior to that of the plaintiff, then we submit that the evidence in support of their title by limitation was such as to require the trial court to submit the question to the jury for their consideration."

We have called attention to the fact that there is no exception appearing in the record complaining of the action of the lower court in directing a verdict for the plaintiff below for a part of the land and for the defendants below the remainder.

This it seems to us is sufficient answer to all complaint *arguendo* as to the action of the court in this matter; but if it is not sufficient answer certainly petitioners are required to present a record to this court overcoming the presumptions indulged in favor of the action of the lower court by affirmatively showing that all the facts are before the appellate court which were before the court below, that this court might see whether or not his action was justifiable. No pretense can be made that the Bill of Exceptions in this case complies with that prerequisite to a review of the court's action in directing a verdict which counsel says "is what we are asking this court to revise."

In the case last cited, Mr. Justice Peckham uses this language:

"In this case there is nothing whatever in the bill of exceptions to show that the evidence contained therein is all the evidence that was given on the trial, and we cannot presume, for the purpose of reversing the judgment, that there was no evidence given upon which the jury might rightfully have found the verdict which they did.

"So, in *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 606, 36 L. Ed. 892, 833, 12 Sup. Ct. Rep. 905, 909, which was an action to recover damages against the company for the death of plaintiff's husband, resulting from the negligence of the company, it was remarked, in regard to the evidence in the case, that 'the bill of exceptions does not purport to contain all the evidence, and it would be improper to hold that the court should have directed a verdict for defendants for want of that which may have existed.'"

V.

SECOND POINT.

(In reply to the "question involved.")

In the absence of a specific exception taken in the trial court raising the identical question upon which complaint is made by assignment of error in the court of review, the appellate court cannot consider whether or not the facts required as a matter of law some other action on the part of the court than that taken.

FACT STATEMENT.

It does not appear in the record that an exception was taken to the charge of the court in directing a verdict upon the ground that the court should have submitted the case to the jury on an issue of limitation. And yet that is the proposition now urged upon the Supreme Court.

COMMENT.

Assuming, therefore, that respondent had the title to the land sued for, it was of course entitled to recover the same from the petitioners unless defeated in whole or in part by the Texas statute of limitations.

If this were a case in equity where this Honorable Court was at liberty to go into the evidence and review the facts as a trial court, it would be our duty to critically analyze the various facts reflected from the record on the question of adverse possession and title by limitation.

Most of the land was awarded to the defendants under their pleas of limitation (R. 82 to 96).

Less than 500 acres of the land was held by the trial court not to be barred by the statute of limitations.

The court carefully analyzed the evidence and made calculations as to what was barred and what was not barred by the limitation statutes. He summed this up in a brief charge, covering about two pages of the printed record (R. 81-82).

He did not in the charge go into an analysis and discussion of the evidence bearing upon the various pleas of limitation, but he directed a verdict which had "been prepared by counsel, and agreed upon as correctly reflecting the facts, as controlled by the court's view of the law, and I will ask that one of your members as foreman, kindly sign the verdict" (R. 82).

The verdict immediately followed (R. 82-83).

In the course of this complicated treatment of the facts in this case, the rights of the defendants, among themselves, were adjusted in the verdict and judgment, and as to the land recovered by the plaintiff and the defendants against whom the recovery was had were awarded the full value of their improvements made upon the premises, as well as the full amount of money which with legal interest thereon had been paid by them to the Coleman-Fulton Pasture Company, whose title had been conveyed to them (R. 82 to 96).

Now to all of these proceedings, summed up by the court in its charge to the jury, *the following exception alone was interposed:*

Petitioners' Exception.

(Upon which the "question involved" rests.)

"At the time the said charge and instruction quoted above was given by the court to the jury, the defendants and each of them, in the presence of the jury and before the jury had considered or returned their verdict, duly excepted to such portion of said charge and instruction" (R. 201).

As noted above, it is our contention that that character of exception raises no issue reviewable in the appellate court.

The effort is made to evolve issues out of that exception in assignments of error, specifying a large number of grounds for the first time in the appellate court. That this cannot be done is well settled.

It was observed by the court in *Hanson v. Boyd*, 161 U. S. 397:

"And the assignments of error cannot be availed of to import questions into the record in the absence of an exception which directs the attention of the court to the particular portions of the charge objected to."

There was no exception or complaint at the charge of the court below because it was a peremptory direction to the jury to find for the plaintiff a portion of the land, and to find for the defendant the remainder; nor to any other disposition of the case as made by the trial judge.

It is true that before the court charged the jury a bundle of Special Charges had been placed in his hands,

dealing with sundry phases of the theory of adverse possession and statutes of limitation. And it is true that the trial judge refused to give these sundry charges, each and all, and that exception was taken to such refusal. But this exception was taken to that action of the court "before the court charged the jury" (R. 199).

As stated, there was no exception taken to the action of the court in directing a verdict, unless the general exception to the court's charge can be so considered. That it cannot be so considered, we believe is well settled

Therefore, counsel preparing this brief is reluctant to follow the adversary counsel in a categorical debate of the questions raised in their special charges and points of law made therein, none of which are before the Supreme Court by proper specifications of error.

We will, nevertheless, attempt to show this Honorable Court that there is no merit in the contentions made:

VI.

THIRD POINT.

General Counter Proposition.

(In reply to all of those propositions of petitioners bearing upon the question of limitation.)

There was no such adverse possession of the land in controversy by the Coleman-Fulton Pasture Company as to mature title against the true owners under any of the statutes of limitation of the State of Texas.

STATEMENT.

An inspection of the Exhibits "A" and "B" in the record will show the one hundred and seventy odd thousand acres of land known as the Coleman-Fulton Pasture Company's Ranch.

As stated by the trial court, and the statement is unexcepted to, fourteen miles of the front of this territory was bounded by the Corpus Christi and Nueces Bays on the south and by a stream on the north known as Chiltipin Creek. Wire fences were run from one portion of the bay to Chiltipin Creek, cutting off a portion of the Houston survey and leaving it in what is known as the Cruz Pasture, the remainder (being a portion of the land recovered by the defendant in error) remaining in that territory bounded on the north by Chiltipin Creek and on the south by Nueces Bay.

And in the portion known as the Cruz Pasture, which had no bay front and which was made by connecting wire fences with Chiltipin Creek and adjacent land owners, is the capital city of the County of San Patricio, a place called Sinton.

This town is the county seat of the county, and to it run the St. Louis, Brownsville & Mexican Railroad, and the San Antonio & Aransas Pass Railroad. And through this pasture called the Cruz Pasture runs the Peter Mill and Sinton public road; the Sharpsburg & Rockport public road and the San Patricio & Victoria public road.

The only improvements of the Coleman-Fulton Pasture Company in this territory consisted of some windmills scattered about over the prairie where water was pumped out of the ground by the force of the wind to water the stock running at large therein.

The town of Sinton has a court house and jail, public schools, and banks, a population pursuing the various avocations of a town or city life, all within the enclosure called the Cruz Pasture (Ex. B. R. 204).

An attempt was made to show by the manager of the Pasture Company that this city was fenced off separately from the balance of the pasture: He said:

"The Town of Sinton at that time was fenced in a tract of land about 200 acres, which on this road there was a gate at the upper end as we ran into the Town of Sinton" (R. 170 bottom).

He was then asked the question:

"How long did that fence continue around the Town of Sinton?"

His answer was:

"About 1910, as near as I can remember, some time in that year; that is, on the side next to the Paul land" (R. 172).

It will be noted that he did not claim that there was any isolation of the Town of Sinton in this point, but qualified his statement that it was fenced "on the side next to the Paul land" (See Plat, Exhibit "B," R. 205).

There was no claim that any portion of the Houston Survey had any improvements on it in the Cruz Pas-

ture, until the defendants to whom it was awarded by the judgment of the court took possession under deeds and acquired title by limitation.

There is no issue as to any of these claimants, because they are eliminated from this record by the judgment of the court below in their favor.

So far as this record shows, they had each of them acquired title to the land by their respective occupancies. And the facts concerning the same are not brought forward in the bill of exceptions.

As to the land in controversy in this writ of error (which is the land in the Picatche Pasture bounded on the north by Chiltipin Creek, and on the south by the Nueces and Corpus Christi Bays) the evidence shows that the Sharpsburg & Rockport public road ran right through this land, and near it the San Antonio & Aransas Pass R. R., and that within the same enclosure relied upon to show title by adverse possession under the limitation statutes, are the three towns of Portland, Gregory and Taft (Ex. B.—R. 204). These towns the evidence shows are places where business is carried on by the population composing the towns, with banks, public schools and sundry other incidents to such communities.

Barring a possession taken of this land by the individual defendants other than the Coleman-Fulton Pasture Company, some of whom had matured their title under the five years statute of limitations and some of whom confessedly had not, to-wit, the Alice State Bank

and its co-plaintiffs in error, there had never been any pretense of occupancy of the Houston survey except a cattle pen, where live stock in the spring of the year were rounded up and calves branded, which had for some years been used on the extreme southern line of the survey. In fact, the lien of the survey ran through this pen. And near there a wind mill had been put up, to pump water for the cattle roaming over that range, similar to the wind mills dotted about in other directions. And the evidence indicated that a small shack or cabin was for a time on or near the south boundary line of the survey, which was occasionally occupied by Mexicans.

One of these Mexicans was named Juan Cruz, and his testimony is found on page 162 of the record. He said he lived there in 1874 with his father and two sisters, there up to the year 1878. He said there was no cultivation of the land but there were branding pens there used for branding cattle. He said after he left the premises were vacant for three or four months when another Mexican named Benevides moved in (R. 163).

Another of these Mexicans was Juan Flores. He said he commenced work for that Pasture Company in 1884 as a cowboy; that it was at the Pistola Mill—the wind mill on this land—there were two pens and two houses there, a well and wind mill (R. 163). That in 1884 a man named Musces lived in the house; “he was not working for anybody” (R. 163).

On cross examination he said that the old house had two rooms and the other house was very small, and that

Musces lived in one and Bantez was out there; that "they were very old men and did not do much work. Nobody lived there then except these two old men, I think they were there three or four years (R. 164). There were two pens, one was about an acre square, a very large pen, and the other was a small pen" (R. 164).

He then says these old men planted some squash and watermelons around there. But his evidence shows that the land they cultivated was south of the pen, which of course places it outside the limits of this survey, the line running through the pen (Ex. A.—R. 203).

On re-cross examination, this witness said:

"After these two old Mexicans left there nobody lived in these houses. When I first knew the place as Pistola the public road passed near the windmill, right at the edge of the pen—the road from Rockport to San Patricio—it was a much traveled road and passed near the edge of the pen" (R. 164).

These witnesses were relied upon by the plaintiffs in error to make out a case of adverse possession, by showing occupancy in that manner of a portion of the land in question.

COMMENT.

(1) Putting a windmill on a tract of land; maintaining stock pens thereon and occasional occupancy of a camp house thereon, do not constitute adverse possession, as is shown by repeated decisions of the Supreme Court of Texas. See

Nona Mills Company v. Wright, 102 S. W. 1121, 101 Tex. 14.

Sellman v. Hardin, 58 Texas, 86.

Hyde v. McFaddin, 140 Fed. 433.

Dunn v. Taylor, 113 S. W. 265, 102 Tex. 80.

Barting v. McElroy, 123 S. W. 1174.

Stevens v. Pedregon, 173 S. W. 210.

In the Nona Mills Company case Chief Justice Brown said:

"To constitute adverse possession the party occupying the land must in some way appropriate the land to some purpose to which it is adapted. Mere occupancy of land without any evidence of an intention to appropriate it will not support the statute of limitation. * * * Warren Brown made no improvements upon the land during his first occupancy except to build a camp. He went upon the land for the purpose of hunting 'varmints' as he states * * *. It surely could not be contended that the camping upon a tract of wild land would constitute such adverse possession as would notify the owner that his land was being claimed by another. There is not as much evidence of an intention to appropriate the land by Brown as there was in the case cited above (*Sellman v. Hardin*), in which the claimant *maintained hog pens upon the land and had used it for the purpose of feeding his hogs thereon for many years, during which time he had cut and carried away fire wood from it, and protected the land from trespass by other people, at the same time using it as a range for his cattle and horses*" (Italics ours).

In the *Sellman* case, just referred to, the Supreme Court said:

"The court did not err in holding that the evidence offered by the appellant was not sufficient to show such adverse possession as would sustain his plea of limitation" (Italic ours).

In the case of *Stevens v. Pedregon*, *supra*, the second syllabus reflects the opinion, and reads:

"Possession is neither continuous nor adverse, as required to bar the right of the owner, where one encloses no part of the land, does not reside on it, and merely cultivates a small part of it, one year at one place, the next at another, and some years, because of lack of water, cultivates no part."

And in the case last cited, the case of *Sellman v. Hardin*, is again approved.

(2) It is equally well settled in Texas that the trespassing claimant's possession must be exclusive (*Wiley v. Borgmen*, 90 S. W. 1116; *Richards v. Smith*, 67 Texas, 612).

In the *Richards* case, *supra*, it is said:

"To give title by limitation there must be an adverse claim and exclusive occupation or possession of the thing for the length of time and under the circumstances prescribed by the statute."

With four towns and villages, with the county seat of the county, sharing in the occupancy and possession of the territory enclosed by the fences in conjunction with the water barriers on which the Coleman-Fulton Pasture Company ranged its herds of cattle, we submit that the possession of that company as a matter of law did not meet the requirements of our statute as construed by the courts of last resort in Texas.

If the mere fact that the Houston survey was in the limits of the boundaries enclosed by the water and the

fences of the Coleman-Fulton Pasture Company without regard to the pedal possession of the land in controversy, gave that company a requisite adverse possession of this land so as to toll the title from the true owners, then by the same process of reasoning the same company had adverse possession of every vacant lot in the City of Sinton, in the Towns of Portland; Gregory and Taft. And by the same process of reasoning a trespasser could string a fence from the Mississippi River across to Lake Pontchartrain and put his cattle in the enclosure thereby made and deprive the true owners of the tracts of unoccupied land within that enclosure.

The United States Circuit Court of Appeals, 5th Circuit in *Hyde v. McFaddin*, declined to extend the rule of adverse possession to such irrational limits; and while each case necessarily depends largely upon its own peculiar facts, we submit that there is no well considered decision in Texas that would sustain the position of the plaintiffs in error in this case on the character of possession exhibited in this record.

An examination of the cases cited by opposing counsel in support of their claim of title by limitation in the case at bar will disclose the fact that they are widely variant in their facts from the case at bar. In some of them the expressions of the writers of the opinions are purely *dicta*.

We earnestly contend the rights of the petitioners must rest upon the determination of the question of whether or not they showed such an appropriation of

this survey of land in whole or in part, by actual possession of it, with the use, cultivation and enjoyment required by law, as to mature title by limitation.

And as we view the matter, *the question of the water front and barbed wire fences enclosing 170,000 acres of land, with numerous roads running through it, with two railroads, and with thousands of people living therein in Sinton, Portland, Gregory and Taft, is a matter wholly apart from the question of adverse possession of the land in controversy.*

The trial judge doubtless took this view of it and made the calculations as to the sundry defendants who had actually been upon this land for periods of time long enough and under circumstances sufficient in law to constitute title by limitation. And having figured this out, he directed a verdict for those who were entitled to hold their land by limitation, and directed a verdict against those who had not established their pleas, and this conclusion was sustained in the light of this record, by the court of appeals.

We respectfully submit that the lower courts were right in holding that there was no title shown under the statute of limitations by virtue of the kind of possession shown to have been had by the Coleman-Fulton Pasture Company.

VII.

If we are right in the two main divisions of this case, to-wit, on the question of title (not specifically

challenged by petitioners) and the issue of adverse possession as raised in the exceptions above noted, then of course, it will be unnecessary for the court to inquire into whether or not the 19 special charges which were asked and refused, and to which exception was taken before the court charged the jury, have presented *arguendo* any errors of law for the consideration of this Honorable Court.

In this connection we desire to lay down the following

General Counter Proposition.

A special charge which in and of itself is not correct as a proposition of law, cannot be the predicate for error because such incorrect charge was refused by the trial court.

COMMENT.

We believe it unnecessary to cite authorities in support of this proposition. To put the lower court in error in this manner it is necessary that the special charge should be itself clear of error.

It is our purpose to show that the requested charges at all events were either academic declarations or inaccurate and erroneous propositions as applied to the instant case.

(1) Special Charges Nos. 1 and 2 (relating to the three years statute of limitations); No. 3 (relating to the five years statute of limitations, and No. 4 (relating to the ten year statute of limitations) (R. 59 to

65) were all refused by the court. Each of them contained a definition of what is meant by peaceable and adverse possession, etc., and then instructs the jury if they believe from the evidence that "the defendants and those under whom they claim have had peaceable and adverse possession of the Sam Houston survey in controversy" (under—the three, five or ten years statutes as the case may be—) "at any time between June 22nd, 1874 and May 30th, 1914, then you should return a verdict for the defendants, unless you find for plaintiff under another instruction given you."

It would have been at all events erroneous for the court to have given these instructions, for the simple reason that during the larger part of the period of time "between June 22nd, 1874, and May 30th, 1914," some of the heirs who held the title to this land were under the disability of coverture or of minority, so that no limitation did or could run against them in favor of the defendants.

This is true of the interests held by Mrs. Nannie Houston Morrow (R. 100), of Margaret Lee Houston, the wife of W. L. Williams (R. 100), of Mary W. Houston, the wife of J. S. Morrow (R. 100), and of Nettie Houston Bringhurst, who was a minor until the year 1873, and who married Bringhurst in 1877 (R. 100), and of Andrew J. Houston, who was a minor until the year 1875 (R. 101), and of William R. Houston, who was a minor until the year 1879 (R. 101) and of Temple Houston who was a minor until the year 1881 (R. 101).

This is sufficient to show that these charges would have been erroneous if given as requested, irrespective of any other question affecting their pertinence.

The five years statute of limitations could not, of course, apply, as stated in the special charges, because until the partition deed made in 1879 the defendants had no deed of record as required by law describing this land (R. 116).

The only muniment of title which they had was the conveyance from J. Carroll Smith, one of the five executors of Sam Houston, deceased, dated July 22nd, 1871 (R. 112), *which did not purport to convey the land in controversy in this suit, but only the original Sam Houston bounty warrant then located in Polk County, Texas, where so far as this record shows, it is still located* (R. 117 to 119).

Certainly a record of their deed in San Patricio County was not a conveyance of the land in controversy; but if it had been of record in Polk County where that bounty warrant was located, and if the other requirements of the statutes had been complied with, it would have enabled the holders thereunder to prescribe under the five years statute of limitations as to the land in Polk County which it concerned.

It is manifest, therefore, that until they obtained a deed of record in 1879 (being a partition deed among themselves), the five years statute of limitations could in no event apply. And at that time each of the married women above mentioned were protected by the

disabilities of coverture against the operation of the statute.

It may be here noted that in 1891 the Legislature enacted a law prohibiting the operation of the ten years statute of limitations as affecting land embraced within a pasture of more than five thousand acres, *unless one-tenth thereof shall be cultivated and used for agricultural purposes, or used for manufacturing purposes, unless there be actual possession taken of the particular tract in question*" (Vernon Sayles Statute, Art. 5678).

The disability of coverture was not removed in Texas until the year 1896 (Vernon Sayles Statute, Art. 5684). Therefore we earnestly submit that there was no error in the lower court declining to give to the jury the special charges complained of.

(2) The next Special Charge is No. 5 (R. 65-6).

This is an academic definition as to the character of enclosures required under the limitation statutes, and we deem it unnecessary to make any reply to it other than has been made in other portions of this brief.

(3) The next is Special Charge No. 6 (R. 66).

It is also an academic definition of adverse possession under recorded deeds.

(4) The next is Special Charge No. 7 (R. 68).

This charge instructs the jury that they should return a verdict for the defendant at all events for one-eighth interest owned by Temple Houston.

This would have been erroneous if given, because a trespasser without title cannot defeat a recovery by

a tenant in common on the ground that the co-tenant is not clothed with all of the title to the land.

A tenant in common of an undivided interest is entitled to recover as against a trespasser the entire estate. So ruled in the following cases:

Wright v. Dunn, 73 Texas, 292, 11 S. W. 330.

Johnson v. Schumacher, 72 Texas, 334, 12 S. W. 207.

Ney v. Mumms, 66 Texas, 268, 17 S. W. 407.

Hutchins v. Bacon, 46 Texas, 414.

Sowers v. Peterson, 59 Texas, 216; 38 Cyc. 216.

Lane v. Miller & Vidor Lbr. Co., 176 S. W. 102.

(6) The next is Special Charge No. 8 (R. 68).

Which in effect tells the jury that the fences and the water boundaries in the case at bar "would constitute a sufficient enclosure under the defense of the ten years limitation."

It is unnecessary to say that at most this is not true as a matter of law, as presented in this charge, but might raise an issue of fact for the jury to determine whether or not it would be such possession as would put in operation the statute of limitations.

We, however, deny that even this is true. (*Hyde v. McFaddin*, 140 Fed. p. 433, 77 C. C. A. 655; *Vinyard v. Brundett*, 42 S. W. p. 232, and the other cases heretofore noted.)

7. The charge then continues by telling the jury that if the defendants "for ten years, at any time prior to the

bringing of this suit," had such possession, they should find for the defendants, "unless you find that during such particular ten years some of the heirs of Sam Houston were married women with husbands living, in which latter case you will be governed in your findings by the court's charge on the effect of marriage of a woman upon the running of limitation" (R. 69).

What has been said under the first special charges above treated, is applicable here. We believe it would have been error under any theory of this case for the lower court to have given that charge.

(8) Special Charge No. 9 (R. 69-70).

This charge is an academic instruction as to the disability of coverture, and informs the jury that each of the Sam Houston heirs "claim an undivided one-eighth of any estate left by their father."

Of course if the property in controversy was the estate left by their father and not a grant by the sovereignty of the State of Texas to these heirs as it was by special Act of the Legislature that part of the charge would be correct.

(9) Special Charge No. 10 (R. 71).

This charge is an academic definition of what is meant by adverse possession. It is not theoretically correct, because the latter part of it is not correct, wherein it is said that; "this is true without regard to whether any or what part of the land is actually enclosed or the character of the enclosure, if any."

We submit that under the decisions of the Supreme Court of Texas, cited under our general counter proposition, *supra*, an owner of land cannot be deprived of his title by any sort of open, hostile claim short of actual possession. It is possession of the land and "use, cultivation or enjoyment thereof" alone which is "sufficient to constitute the adverse possession required by the five years statute."

(10) Special Charge No. 11 (R. 71-2).

This charge instructs the jury that if they find from the evidence that the Coleman-Fulton Pasture Company, claiming under a duly recorded deed, "entered upon and made improvements upon a part thereof, and further enclosed a part thereof by fence, then I charge you that the possession of the Coleman-Fulton Pasture Company extends to the boundaries of the land in question." And that as to the part enclosed, "it was in actual possession, and as to the part not enclosed it was in constructive possession."

We have already quoted the testimony of the Mexicans put upon the stand by the plaintiffs in error to show the actual occupation of this land, and we submit that it was wholly insufficient to justify a verdict based thereon under any of the statutes of limitations.

The possession had in the case of *Spellman v. Hardin, supra*, held insufficient by the Supreme Court of Texas, was much stronger in character than this. So was the possession of Warren Brown held insufficient, in the case of *Nona Mills Company v. Wright, supra*.

The charge is objectionable for the further reason that it assumed as a matter of law that it was sufficient, when at most it could only be contended that it was a question of fact for the jury to determine.

(11) Special Charge No. 12 (R. 73).

What has just been said concerning requested charge No. 11 is equally applicable to requested charge No. 12.

(12) Requested Charge No. 13 (R. 73-74).

This simply tells the jury that the deed to the Coleman-Fulton Pasture Company is the kind of deed required by the five years statute of limitations "and was duly registered on June 10th, 1881."

(13) Special Charge No. 14 (R. 74-75).

This is an instruction that the Coleman-Fulton Pasture Company paid the taxes on the land in controversy "as required by the five years statute of limitations."

(14) Special Charge No. 15 (R. 75).

This charge assumes as a matter of law, and so instructs the jury, that the Coleman-Fulton Pasture Company's possession "was the peaceable possession required by the statute of five years limitations."

(15) Special Charge No. 16 (R. 76).

This charge instructs the jury that the possession of the Coleman-Fulton Pasture Company and those under whom it claims was hostile and such as required by the five years statute of limitations; and that "their possession (if any) of the land in controversy claimed by them,

was the adverse possession required by the said statute," if it was a "visible appropriation of the land."

It then announces that "it was not necessary for the land or any part thereof to be actually enclosed to constitute such an appropriation," etc.

The terms of this requested charge is its own repudiation. Of course, it was not error to refuse to give such instruction.

(16) Requested Charge No. 17 (R. 77).

This charge instructs the jury that the portion of the Houston Survey included in the Cruz Pasture "was the peaceable and adverse possession required by the five years statute of limitation."

This was error, first, because it assumed the question of fact as one of law; second, because they had no possession of any part of the Houston survey in the Cruz Pasture until the farmers to whom the Pasture Company sold that portion of the land went upon it and enclosed it and cultivated it, and it was awarded to them under their pleas of limitations in this suit; third, because the Coleman-Fulton Pasture Company's possession in the Cruz Pasture was not exclusive. It was shared in by all of the inhabitants of the City of Sinton, the county seat of the county, as heretofore shown.

There being no possession of the Houston survey by the Pasture Company in the Cruz Pasture, it certainly was not erroneous to refuse the charge as requested, that "such survey enclosed in the Cruz Pasture constituted the peaceable and adverse possession of the balance of

said survey that is required by the five years statute of limitation."

(17) Special Charge No. 18 (R. 78-9).

This is practically a repetition of No. 17.

(18) Special Charge No. 19 (R. 79).

This is an instruction that the possession of that part of the Houston survey in controversy that was enclosed by the fence built by Tumlinson was the "peaceable and adverse possession of all that part of the survey in enclosure constructed by the said Tumlinson."

Such were the special charges presented to the lower court and refused by him, numbered from one to nineteen.

Such were the contentions made below. The specification of error here presented was not presented in the trial court by exception or by special charge, unless by inference or argument.

This court is familiar with the rule that "the burden of proving adverse possession rests upon the party alleging it."

"The doctrine of adverse possession is to be construed strictly, and such possession cannot be made out by inference but only by clear and positive proof" (1 Am. Eng. Enc. of Law, 2nd Ed. p. 887).

As said in the case of *Tucker v. Smith*, 68 Texas, 481:

"Both limitation and estoppel are pleas requiring much clearness of proof."

It was said by Chief Justice Brown, in the case of *Nona Mills Company v. Wright, supra*, that possession alone was insufficient.

In that case Warren Brown lived on the land in a shack and hunted "varmints" for a living, but the court held as a matter of law that this did not constitute the kind of possession required by the statute, although Brown swore he was claiming the land adversely.

To the same effect is the case of the Supreme Court of Texas, in 102 Texas, styled *Dunn v. Taylor*, page 80, which reverses the decision of the Court of Appeals, reported in 107 S. W. and quoted from at length in the brief of opposing counsel on pages 167 to 169, filed by them in the Court of Appeals.

We are not combatting the proposition of law that possession of a part under a muniment of title is constructive possession of the remainder where the part in possession has not been restricted and limited to the tenant's actual occupancy.

The rule with its limitations is illustrated in the following cases:

Houston Oil Company v. Kimball, 114 S. W. 667.

Houston Oil Company v. Kimball, 103 Tex. 105-6.

Weir Lumber Company v. Conn, 156 S. W. 276, 279, 280.

Conclusion.

In view of the fact that there was no exception specifically pointing out wherein the court committed error to the prejudice of the plaintiffs in error in awarding to the defendant in error 486 acres of land in controversy and to the remaining defendants below, the balance of the 1280 acres involved in this suit; and in view of the fact that the complicated calculations made by the court in arriving at the disposition of the case, as evidenced by his charge to the jury, were not pointed out by any exceptions in the court below as erroneous, which it was their bounden duty to do if they expected to complain in this court, we submit that the judgment of the court below, dealing with this complicated case in its varying currents of claim and counter claim between the litigant parties, was properly affirmed by the Circuit Court of Appeals.

The statement in the brief by petitioners that the decisions of the trial judge and of the United States Circuit Court of Appeals are at variance with the decisions of the Supreme Court of Texas is wholly incorrect, even if it should be conceded that this record shows all the facts upon which the trial judge acted.

In the light of the record the "question involved" presented to this Honorable Court is moot. No court in Texas has ever gone to the length contended for by the petitioners, under facts similar to the case at bar.

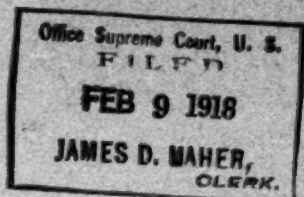
Counsel writing this reply feels that it will be a waste of time to go into a review of the authorities cited and quoted from in the petition, to show their inapplica-

tion to this case. Some of the expressions in the cases quoted from by the Courts of Civil Appeals are purely dicta, as will be apparent from examination of the cases. It is therefore most respectfully submitted that the application for writ of certiorari is without merit and should be denied.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 154.

ALICE STATE BANK ET AL, PETITIONERS,
vs.
HOUSTON PASTURE COMPANY, RESPONDENT.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

JOSEPH W. BAILEY,
Attorney for Respondent.

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SUPPLEMENTAL BRIEF FOR RESPONDENT.

To the Honorable Supreme Court of the United States:

Preliminary Statement.

The record in this case presents two questions, which are:

1. Did the legal title to the land in controversy here, when it passed from the State of Texas, vest in those under whom the petitioners claim, or in those under whom the respondent claims?

2. If the legal title vested in those under whom the respondent claims, have the petitioners acquired it through the statute of limitation?

If the first question should be decided in favor of the petitioners, the second question, of course, becomes wholly immaterial; but if the first question is decided in favor of the respondent, then the second question must be considered with respect to both the five-year and the ten-year statutes of limitation. As I understood the request of the court, however, it was that I should reduce to writing my oral argument upon the legal title, and upon the ten-year statute of limitation, only. I shall, accordingly, confine myself to those questions, leaving the case, so far as it depends on the five-year statute of limitation, to the brief already submitted by my associate counsel, the Hon. W. D. Gordon.

I.

When the legal title to the land in controversy passed from the State of Texas, it passed into the heirs of General Houston; and it now rests in the respondent, to whom it was conveyed by those heirs, unless the petitioners have acquired it through the statute of limitation.

The foregoing proposition is so clear to my mind that it is difficult for me to understand how anybody can dispute it; but as it has been disputed by the learned attorneys for the petitioners, it becomes necessary to argue it. Both sides agree that the title is derived from the act of July 22, 1870, the petitioners contending that the benefit of that act inured to them as purchasers from the executor, and the respondent contending that it conferred no right whatever on executor, the legislature having designated the heirs of General Houston as its beneficiaries. For the convenience of the court, I will here set out that act in full, and it is as follows:

"Section 1. Be it enacted by the Legislature of the State of Texas, That the land certificate heretofore issued by the lawful authorities of the late Republic of Texas, to General Sam Houston for military serv-

ices from November, 1835, to October, 1836, for twelve hundred and eighty acres be, and the same is hereby approved, and declared to be a just claim from its original date against the State of Texas; and that the Commissioner of the General Land Office be and is hereby authorized to issue a patent on the same, in the name of the heirs of General Sam Houston, deceased.

"Section 2. That the owners of any land certificate, located on land in conflict with a previous location made by virtue of the foregoing warrant, and not patented, are hereby authorized to locate the same on other lands; and that this act take effect and be in force from and after its passage."

As plainly as it is possible to express an idea in simple words, the Commissioner of the General Land Office was there directed to issue a patent to the heirs, not to the estate, of General Houston; and the legislature intended that the children, not the creditors, of General Houston should enjoy the benefit of it. That such is the proper construction of that act has been authoritatively settled, I think, by the Supreme Court of Texas in two cases, *McKinney vs. Brown*, and *Bates vs. Bacon*, which I will now proceed to analyze.

In *McKinney vs. Brown*, 51 Texas, 94, the facts were these: On February 1, 1838, a headright certificate, No. 238, for one league and labor of land was issued to George Brown, as a member of Austin's colony; and on February 27, 1838, he assigned it to Josiah H. Bell. But as that certificate had not been recommended by the Commissioners appointed under the act of January 29, 1840, nor established by suit, it was nullified by the constitution of 1845, Article XI, section 2; and Brown having died in the meantime, the legislature of Texas, in 1856, passed a special act, directing that a new certificate for one league and labor of land should be issued to his heirs, in lieu of his headright certificate, No. 238. The certificate, issued in accordance with that special act, was located on September 7, 1860, and the land was patented "to the heirs of George Brown, deceased, their heirs or assigns."

Suit was brought by the heirs and representatives of Bell against the heirs of Brown. The plaintiffs claimed under the original certificate which was assigned by Brown to their ancestor, Bell; and the defendants claimed under the special act of the legislature. Judgment was rendered against the plaintiffs and for the defendants in the trial court. The case was then appealed to the Supreme Court of Texas, and affirmed, the court holding that as the original certificate "was neither recommended nor established by a suit, as required by law," the special act was one of "sovereign grace," and "being a mere gratuity, the legislature had the right to designate to whom the same should be given."

In that case, Brown, who was entitled to the land and to whom the original certificate for it was issued, had himself assigned it; and yet the court held that the special act passed after his death and directing that a new certificate should be issued to his heirs, did not inure to the benefit of his assignee. If that be the law—and it is the law in Texas, for *McKinney vs. Brown* has never been overruled or modified—then *a fortiori* this court must hold that as General Houston himself had done nothing which could give these petitioners the shadow of a right to this land, the special act for the relief of his heirs did not inure to the benefit of those who had purchased from the executor of his will.

The facts in *Bates vs. Bacon*, 66 Texas, 348, as they were related in *Bacon and Bates vs. Russell*, 57th Texas, 409, were these: William J. Russell had participated in the campaign against Bexar in 1835, and for that service, he alleged that the act of December 21, 1837, entitled him to 640 acres of land, for which a patent was issued to him under a special act of the legislature, approved February 19, 1873; but that patent was declared void in *Bacon and Bates vs. Russell*, 57 Texas, 409, because the Act authorizing it was in conflict with the constitution of 1870, Article X, section 6.

What is known in the history of Texas as the constitution of 1870, was adopted by a convention in 1868, and ratified by the people in 1869, but it did not become operative until

Congress approved it, under the reconstruction laws, on March 30, 1870. Between that date and the adoption of the constitution of 1876, the legislature had passed a number of acts similar to the one held void in *Bacon and Bates vs. Russell*. That case was decided in 1882, and the legislature at its next session passed, as the constitution of 1876, then in force, permitted, a validating act, which is as follows:

"All surveys and patents by virtue of headright or bounty warrants issued under special laws enacted after March the 31st, 1870, and prior to April the 11th, 1876, to which there is no valid legal objection other than that such special laws are supposed to be in conflict with the constitution then in force, are hereby validated and confirmed and declared to be as binding upon the State as they otherwise would be if such special laws had been permitted by constitution; provided that, if such headright or bounty certificates have been forfeited under existing laws by location and survey on appropriated land, this act shall not be construed to revive the same; provided further, this act shall apply only to soldiers and heirs and actual settlers of Texas, and their vendees, to whom lands have been granted."

Almost immediately after the above act was approved on March 31, 1883, Bates, who had purchased at an execution sale against Russell, on June 5, 1877, brought suit for the land, insisting that, although the patent through which he deraigned had been declared void in *Bacon and Bates vs. Russell*, his title had been perfected by the act of March 31, 1883. But the Supreme Court held that as the special act was void, the patent issued under it passed no title, and that the validating act did not "pass to the purchaser at execution sale any claim the defendant in execution may have had upon the charity or liberality of the sovereign." Let us briefly recapitulate the facts in those two cases, and compare them with the facts in the case at bar.

In *McKinney vs. Brown*, the certificate was void under the constitution of 1845; the legislature passed a special act,

as it then had a right to do, authorizing the issuance of a new certificate to the heirs of Brown; and the court held that the land patented on that certificate was a donation, which belonged to Brown's heirs, and not to his assignee.

In *Bates vs. Bacon* the patent was issued under the void act of February 19, 1873; the legislature validated that void act by the act of 1883; and the court held that when the legislature validated that void patent, as it had a right to do under the new constitution, the title passed to the beneficiary named in the special act, and not to a purchaser at an execution sale against him.

In the case at bar the patent was issued under the void special act of July 22, 1870; the legislature validated that patent by the act of March 31, 1883, thus making the analogy complete; and we ask this court to hold that when the void special act was validated, the title to the land in controversy here passed to the heirs of General Houston.

The patent in each case was void under the constitution. In *McKinney vs. Brown* the legislature, by a special act, directed the issuance of a legal patent in lieu of the void patent. That was permissible under the constitution of 1845; for while it annulled all such certificates as that held void in *McKinney vs. Brown*, it did not prohibit, as did the constitution of 1870, a direct grant of land. In *Bates vs. Bacon*, and in the case at bar, the patents were both void—made so by the same constitutional prohibition—and they were both validated by the same act—that of March 31, 1883; and this court cannot hold that the title to the land in controversy here, when validated by the act of 1883, passed to those who purchased from General Houston's executor, without utterly disregarding the decision of the Supreme Court of Texas in both *McKinney vs. Brown* and *Bates vs. Bacon*.

Neither *McKinney vs. Brown* nor *Bates vs. Bacon* can be distinguished from the case at bar upon the theory that the land was granted in those cases as a donation; because that

was the nature of the grant in this case. Whether the Houston certificate was void or merely barred—and I believe I will be able to demonstrate in a subsequent part of this brief that it was both—the special act of July 22, 1870, made a pure donation, under either view of it. If the certificate was void, then the special act of July 22, 1870, made a donation under the authority of *White vs. Martin*, 66 Texas, 340, 342, where the court, in discussing such a certificate, said:

“The special act of the legislature directing a certificate to issue in lieu of it, was but, in effect, a direction to issue a land certificate as a donation. Such legislation would be the first and most important step in making a legislative grant of land.”

If there be any difference in legal effect between a certificate which is void, and one which is merely barred, and if the Houston certificate belonged to the latter class, the special act of July 22, 1870, nevertheless made a donation under the authority of *Bates vs. Bacon*, where the court, in discussing a bounty land warrant, said:

“So stood the law at the time of the adoption of the constitution of 1870. Ample time had been given to all who were entitled to receive the bounty of the government, and those who had not done so were barred.

“In the absence of the constitutional provision referred to, the legislature might have removed the bar, and have given further time and means to acquire the certificates, as had been so often done before; but the right having ceased, and the constitution having declared that the grant should not be made, the legislature was powerless to revive the right which had once existed, but had been lost by the failure of the party to apply for and receive the same from some of the officers of the government authorized from time to time to issue the certificates.”

In the brief for petitioners several cases are cited in support of their contention that the special act of July 22, 1870,

inured to the benefit of the person who had purchased from the executor of the Houston will; but not one of those cases, if I understand them, sustains that proposition. The first case cited, and the one from which the most extended quotation was made, is *Ralston vs. Skerrett*, 82 Texas, 476. The special act under consideration in that case, authorized and required the Commissioner of the General Land Office to issue the certificate to M. B. Skerrett, without any mention of his heirs, and in its opinion the Supreme Court of Texas emphasized that circumstance, contrasting it in that respect with *McKinney vs. Brown* to the extent of italicizing the word "heirs." On page 489 the court said:

"The real question in this case is, to whom does the benefit of the validating act inure? Appellees contend that it inures solely to their benefit as heirs of M. B. Skerrett, and appellants contend that it inures to those who claim through regular chain of transfer the original right M. B. Skerrett had to a headright grant.

"In the case of *McKinney vs. Brown*, 51 Texas, 96, it appeared that a headright certificate issued to a colonist of Austin's colony, and that he transferred it to Josiah H. Bell, but that it was not recommended by any of the boards appointed under the acts to detect fraudulent certificates, nor was it established by suit. The colonist having died in 1856, the legislature by special act directed a certificate to issue to his heirs, and a contest arose between these heirs and the heirs of Bell as to the title to the land patented under the certificate, directed by the special act to issue to the heirs of the colonist. Under this state of facts, it was held that the special act conferred a mere gratuity, and that this being given expressly to the heirs conferred title on them alone. The following cases illustrate the same rule: *Eastland vs. Lester*, 15 Texas, 102; *Gaucci vs. La Costa*, 20 Texas, 286; *Todd vs. Masterson*, 61 Texas, 618."

The second case cited is *Sherman vs. Pickering*, 56 Texas Civ. App., 633, in which the special act directed that

the warrant should be issued to the soldier originally entitled to receive it, without any mention of his heirs, just as the special act had done in *Ralston vs. Skerrett*; and, that case was decided, as the quotation from the opinion made by the petitioners on page 71 of their brief will show, upon "the terms of the act itself." It is true that after saying that *McKinney vs. Brown* and the other cases there mentioned "seem to establish the general rule that when a legislative grant is not made in discharge of some obligation of the Government that the law would recognize, such grant would not in any legal sense be any more than an act of sovereign grace and bounty," the court refused to apply that rule to the case then before them, for the reasons thus stated on page 637 of the opinion:

"We do not think that the recognition of this rule necessarily requires a reversal of the judgment of the court below. It is true that at the time the relief act was passed authorizing the issuance of a duplicate land warrant to Sherman, his original claim had become barred under the statute, and therefore the consideration for the grant was not in discharge of an enforceable legal obligation, but we think it clear that if the legislature, instead of authorizing the issuance of a duplicate certificate to Sherman, had merely authorized him to go into court and prove up his original claim and receive a certificate thereon, it could not be said that the certificate thus issued would not have been issued in discharge of a legal obligation, but that the land granted thereby was a donation. It seems to us that the act of the legislature above set out did nothing more than lift the bar of the statute, and thus authorize the discharge of a legal obligation of the State in favor of Sherman."

Without intending any reflection on the wisdom or the learning of the very excellent judge who wrote that opinion, I most respectfully submit that his distinction between an "unenforceable legal obligation" and a "legal obligation" was without any substantial basis in that case. I understand,

of course, that a man may hold the State's "legal obligation," and yet may not be able to enforce it on account of the State's immunity from suit; but that was not the difficulty there. If every court in Texas had been open to the heirs and to the assignee of Sherman, they could not have recovered a judgment against the State on that certificate; because it had been "forever barred" by the law. Not only so, but the statement in that opinion that the special act "did nothing more than remove the bar of the statute and authorize the discharge of a legal obligation of the State in favor of Sherman" is in palpable conflict with what the Supreme Court of Texas said in *Ralston vs. Skerrett*, where, speaking of the act of March 31, 1883, it said:

There was no legal obligation resting upon the State to give the relief given by the act last referred to, and it may be said that it was in this respect gratuitous.

But we could concede the soundness of that opinion without compromising our position in the least; for immediately following what I have quoted from it, and forming a part of the same paragraph, Chief Justice Pleasants made a distinction which exempts our case from the application of his rule, by saying that:

"In the case of *McKinney vs. Brown*, *supra*, this construction could not be given to the relief act in question in that case, for the reason that the legislature at the time that act was passed could not under the then constitution of this State waive the bar of limitation and permit the reinstatement of the original claim."

In *Sherman vs. Pickering* the special act was passed under the constitution of 1845, and was valid, while in our case the special act was passed under the constitution of 1870, and was void; for which reason our case falls under the rule laid

down in *McKinney vs. Brown*, and the argument in *Sherman vs. Pickering* is inapplicable to it.

Allen vs. Clark, 21 Texas, 404, does not touch the question at issue here. Clark was entitled to the land when he died, and after his death the certificate for it was issued to his heirs. There was no special act of the legislature in that case, and the only right of the heirs was by virtue of their heirship. Under that state of facts the court held, without discussion and as a matter not open to argument, that the certificate belonged to the estate of the deceased.

In *Goldsmith vs. Herndon*, 33 Texas, 705, the facts were somewhat peculiar, and the act under which the patent issued seems to have been drawn with reference to their peculiarity. The court stresses the fact that the certificates on which that land was patented were issued "in right" of those who were heads of families, and "in right" of those who were single men, adding that "if this statute be a correct interpretation of the object and intent of those grants, then the certificates could not have been intended as a gratuity or donation to the heirs, nor could they have issued in the right of the heirs." Summing up the case, on page 711, the court said:

"From this review of the cause before us, we are forced to the conclusion that the certificate issued to the heirs of Randolph Slater by the board of land commissioners of Harrisburg county, in 1839, was for a headright to which Slater was entitled during his life-time and at his death, and was therefore assets in the hands of the administrator and subject to the debts of Slater."

The difference—and that difference is a vital one—between that case and the case at bar, is that Slater, during his life-time, and at his death, was entitled to his headright, while General Houston was not entitled to his patent when he died or when the act of July 22, 1870, was passed.

Houston Oil Company vs. Gallup, 50 Tex. Civ. App., 369, was tried without a jury, and the court found as a fact that:

"At the time of the death of Patsy Lewis, in 1843, she had no title whatsoever to the land in controversy in this suit, and it was not the subject of testamentary disposition by her."

And under that finding of fact, the court concluded as a matter of law that:

"The special act of the legislature granting the land in controversy to the heirs of Patsy Lewis was an act of sovereign grace and bounty on the part of the State, and that its benefits inure to all of the heirs of Patsy Lewis alike, and that, therefore, the title thus granted vested in all of the heirs of Patsy Lewis and their assigns."

The Court of Civil Appeals declared that the above finding of fact by the court below was erroneous, and held that:

"Patsy Lewis had acquired a right—an equity—capable of being so perfected as to vest in her an absolute title to the land. Because of her failure to comply with requirements of laws then in force, such an absolute title did not vest in her, and she died owning only an equity in the land. It was this equity which justified the action of the officers of the State in 1847, in 1848, in 1849, and in 1850, in assessing the land for taxes as property belonging to her legal representatives. It was this equity her administrator petitioned the legislature to recognize and perfect by a patent to the land; and it was this equity, we think, that the legislature in 1850 referred to when it declared that she was entitled to the land in her lifetime. *As appears from its plain terms the act of the legislature was intended as a recognition of and as a provision for the enforcement of a right, and not as a donation.*" (Italics mine.)

In that case Patsy Lewis in her lifetime had acquired, and at her death owned, an interest in the specific land, which by

a valid survey had been segregated from the public domain, and that was the crucial fact on which it turned. But in this case no man claims, or pretends to think, that General Houston ever had any interest in this San Patricio County land, for he died nine years before any attempt was made to locate it.

In *Lyne vs. Sanford*, 82 Texas, 58, the court stated each contention and the answer to it in a separate paragraph, numbered from 1 to 11. The 10th paragraph is the one which interests us, and an examination of it, will convince us that the decision was predicated on the particular language of the special act. It will be found at page 65 and is as follows:

"10. That the certificate was not assets of the estate of Farris, but the property of the heirs of Farris; therefore not subject to administration, for the reason that it was a donation to the heirs under the special act of the legislature." By reference to the special act, it will be seen that the legislature in granting this certificate recognized that Willis A. Farris had before his death earned the right to a headright certificate of a league and labor, and in recognition of this right they granted to his heirs or legal representatives the certificate, if he had not heretofore received his headright. The terms of this act clearly imply that the consideration that moved the legislature to grant the certificate was the right existing in Farris by reason of his having complied with the laws under which the certificate was earned. If this was the purpose of the legislature the grant cannot be regarded as a gratuity or donation to the heirs" (*Hill vs. Kerr*, 78 Texas, 218; *Rogers vs. Kennard*, 54 Texas, 34).

The distinction which runs through all of these cases and through all the reasoning of the courts, is that where the certificate was issued to the heirs under circumstances which negatived the idea that it was a gratuity or donation, it belonged to the estate; but where the certificate was issued to the

heirs under circumstances which made it a gratuity or donation, it belonged to them, and not to the estate. Another distinction, as clear as the one which I have just stated, is that where a grant, though made to the heirs, is made in recognition of the ancestors' *right*, it belongs to the estate; but a grant, though based upon a void or a barred claim of the ancestor, if made to the heirs, is a donation and belongs to them.

II.

The certificate issued to General Houston on June 20, 1838, was "forever barred" as a claim against the State of Texas, after January 1, 1861, and as the act of July 23, 1870, entitled "An Act for the Relief of the Heirs of General Sam Houston," was not passed in discharge of any obligation which the law then recognized, the grant made by it, when validated by the act of 1883, was a pure gratuity or donation and belonged to the Houston heirs.

The provisional government established when Texas declared her independence of Mexico, and the Congress of the Republic, after it was duly organized, had enacted several laws granting lands to those who would serve, or had served, in the army during the war for Texas independence. Those laws, having been enacted at different times and to meet different conditions, were thought to be conflicting in some of their provisions, and had certainly introduced some inequalities. In order to remove the conflicts, Congress determined to enact a new law, and in order to correct the inequalities, the quantity of land granted to each soldier was graduated according to the length of his service. This was accomplished by the act of December 4, 1837, which reads as follows:

"Art. 358. An act amendatory to the several acts and ordinances granting bounty lands.

"Whereas, much difficulty exists in reconciling the various conflicting laws granting bounty lands to the soldiers and officers who have served in the army, and

the allowance does not bear an equal proportion in many cases to the services rendered, for remedy whereof,

"1. *Be it enacted, etc.*, That the laws in existence granting bounty lands to those who have served in the army, be so amended as to grant to all who have served three months in the army three hundred and twenty acres of land; to all who have served six months, six hundred and forty acres; to all who have served for nine months, nine hundred and sixty acres, and to all who have served twelve months and upwards, twelve hundred and eighty acres.

"2. That in all cases where warrants for bounty lands have been issued by the Secretary of War for less amounts of land than that specified in the first section of this act, it shall be his duty to issue warrants for the additional quantities allowed by this act."

Under the foregoing law, the Secretary of War, on the 20th of June, 1838, issued to General Houston the following certificate:

"No. 3894.

1280 acres.

"Republic of Texas.

"Know all men to whom these presents shall come:

"That Sam Houston, having served faithfully and honorably for the term of eleven months, from the eleventh day of November, 1835, until the 20th day of October, 1836, and having been honorably discharged, is entitled to twelve hundred and eighty acres Bounty Land, for which this is his certificate. And the said Sam Houston is entitled to hold said land, or to sell, alienate, convey, and donate the same, and to exercise all rights of ownership over it.

"In testimony whereof, I have hereunto set my hand, at Houston, this twentieth day of June, 1838.

"GEO. W. HOCKLEY,

"Secretary of War."

That certificate was, in my opinion, void *ab initio*; because it was not in accordance with the law, and was, therefore,

issued without legal authority. It declared "that Sam Houston, having served faithfully and honorably for the term of eleven months, * * * is entitled to twelve hundred and eighty acres of Bounty Land;" but the statute stated most explicitly, that only those who had served "twelve months and upwards" should receive 1,280 acres of land. Not content with having fixed the length of General Houston's service at eleven months, the certificate descends to details, and fixes the time still more precisely as "from the 11th day of November, 1835, until the 20th day of October, 1836," thus making it doubly certain that he had not served "twelve months and upwards." General Houston could not have served in the army twelve months from November 20, 1835, because we know, as a matter of history, that he was chosen President of the Texas Republic at an election held September 1, 1836, and took the oath of office on October 22, 1836. As the law limited the quantity of land which each soldier was entitled to receive, it must, in the very nature of things, have also limited the power of the Secretary of War in issuing certificates for that land; and the Secretary of War had no authority to issue a certificate for 1,280 acres to General Houston.

But even if I am mistaken in saying that the certificate was void on its face, I cannot be mistaken in saying that the failure to have it approved by the Secretary of War, as required by the act of January 29, 1840, avoided any patent which might have been issued on it, so long as that act was not repealed or amended. The court will remember that I made this statement in my oral argument, and the court will also remember that the attorney who followed me challenged it. He asserted that the act of 1840 did not apply to "bounty land certificates," but only to "headright certificates," and a similar assertion appears in the Brief for Petitioners, on page 65, where it is said:

"While subsequent legislation has required an inquiry *de novo* before one or another commissioner or

tribunal into warrants issued for other purposes, no legislation has ever required any review or further sanction of warrants issued by the Secretary of War for bounty lands for military services."

I was greatly surprised when I read that statement in the brief, and I was even more surprised when I heard my statement to the contrary contradicted at the bar. Fortunately, the court is not compelled, in deciding between my accuracy and the accuracy of my honorable opponents, to rely on the statement of either; for it can resort to the statute which, in my opinion, is so plain as to admit of no doubts. That was "An Act to Detect Fraudulent Land Certificates and to Provide for Issuing Patents to Legal Claimants." It created two traveling land boards, to be elected by the legislature, and to act in conjunction with local boards in each county, elected in the same manner. One of those traveling boards was to visit all counties, the seat of which was situated east of the Brazos River, and the other was to visit all counties, the seat of which was situated west of the Brazos River. The first section required those boards, sitting in joint session with the several county boards, to ascertain by satisfactory testimony what certificates had been issued to legal claimants, and report to the Commissioner of the General Land Office such as they found to be genuine and legal. The eighth section required that those commissioners should also report all claims which had been decided by district courts in favor of the claimants under section 16 of the act of December 14, 1837. Unquestionably, the first and eighth sections related only to "headright certificates;" but the fifth section included "bounty land certificates" as well as "headright certificates," as the court will readily perceive by reading the pertinent part of it, which is—

"5. That the Commissioner of the General Land Office is hereby prohibited from issuing a patent upon any survey that shall not have been or may hereafter be made by authority of a certificate re-

turned as genuine and legal by the commissioners appointed by this act, or by authority of a warrant issued for military services, after the same shall have been presented to and approved by the Secretary of War, or by authority of a certificate issued by special act of Congress; and any patent issued contrary to the provisions of this act shall be null and void." (Italics mine.)

If it should be answered that the above does not avoid the certificate, but only the patent issued on it, my reply would be that the certificate is merely a means to an end—the end being the patent; and it is trifling with the substance of things to insist that the law destroyed the patent, which alone gave value to the certificate, and yet left the certificate itself unaffected. That, however, is not the point upon which counsel for the petitioners differ with me. I said that the act of January 29, 1840, required "bounty land warrants" to be approved, and they said it only required headright certificates to be approved. The statute is now before the court, and if it does not sustain what I said against all contradiction, and refute the statement on page 65 of the petitioners' brief, to which I have called attention, then I confess myself incapable of understanding the English language. It condemns a "bounty land warrant issued for military services" which had not been approved by the Secretary of War to the same extent, and in the same words, as a "headright certificate" which had not been returned as legal and genuine by the board of land commissioners. Indeed, the condemnation is expressed in the same words of the same clause, and the same sentence.

In order that the court may understand, without taking the trouble to make an investigation, why the statute prescribed one method for establishing a headright certificate and a different method for establishing a bounty land certificate, I will make a brief, but a sufficient, explanation. The headright certificates were issued to settlers, and the bounty land certificates, sometimes called bounty land warrants,

were issued to soldiers. That distinction was not always strictly observed, either in the statutes or in judicial opinions; but the names by which the certificates were designated is not important. The manner in which they were issued, however, is very important; because it explains their reference to different tribunals for validation.

The headright certificates were originally issued by local county boards (Act of December 14, 1837, section 11), while the bounty land certificates were originally issued by the Secretary of War (Act of December 22, 1836, section 12). For that reason, the legislature referred the headright certificates to the county boards, acting in conjunction with the general board, and referred the bounty land certificates to the Secretary of War. The evidence calculated to establish the genuineness of the "headright certificates" was generally with the county boards, which had originally issued them, and it could be fairly presumed that such other evidence as might be material could be most easily procured in that county. On the other hand, the "bounty land certificates," having been issued by the Secretary of War, were referred back to his office for approval; because it contained the discharge papers upon which each certificate for military service had been issued, and other data touching the enlistment and the length of service. When Texas ceased to be a republic, and became a State of the Union, she ceased, of course, to have a Secretary of War, and all of "the books, papers, archives, and records belonging to the late Department of War and Marine" were transferred to the office of the Adjutant General, who was required "to issue all bounty or donation warrants, and to settle all outstanding business connected with the War Department heretofore required by law of the Secretary of said Department."

It is not pretended here that the certificate issued to General Houston in 1838 was ever presented to or approved by the Secretary of War, as the act of January 29, 1840, required; and that it was not, is attested by the certificate it-

self, which appears on page 67 of the record without the semblance of a suggestion that any such action was ever taken on it. Having failed to present his certificate for approval under the act of January 29, 1840, General Houston made no attempt to use it in any way until 1853, when he located it on land in Polk County. A survey was made under that location, and the field notes were returned to the general land office. It was then the duty of the Land Commissioner to issue a patent to General Houston, if (1) the land was subject to location; if (2) the proceedings were regular; and if (3) the certificate was valid. But no patent was issued, and we must assume, therefore, that some legal obstacle existed. The land was subject to location, because it was located, as shown by the evidence here, in 1866 under a different certificate; and this record does not contain the slightest intimation of any irregularity in the survey or the field notes. That leaves but one explanation, and that explanation is that the one officer of Texas whose special duty it was to understand and execute our land laws, must have regarded that certificate as invalid.

While General Houston was the most illustrious, he was not the only Texan left with a certificate rendered worthless by a failure to comply with the law. It was a matter of common knowledge throughout the State that many worthy men who held genuine headright certificates had neglected to have them returned as legal by the Board of Land Commissioners, and that some brave men who held genuine bounty land certificates had neglected to have them approved by the Secretary of War. Recognizing that those men had rendered a service which neither land nor money could compensate, Texas resolved to give them a second chance to convert their claims upon her gratitude into land; and accordingly the legislature passed the act of August 1, 1856, entitled "An Act to ascertain the legal claims for money and lands against the State." The first section of that act provided that the legislature, by a joint vote, should elect

a commissioner of claims, and the second section was as follows:

"2. All land certificates of every description, except headright certificates of the first and second class, which have been returned as genuine and legal, by the commissioners appointed under 'An act to detect fraudulent land certificates, and to provide for the issuing patents to legal claimants,' approved 29th January, 1840; and certificates issued under some special act of congress of the Republic of Texas, or of the legislature of this State, and certificates to the colonists of Peters' colony, Mercer's colony, Castro's colony, Fisher and Miller's colony, and the colonists of the German Emigration Company; and certificates issued for premium lands in said colonies, and certificates issued to companies incorporated under the laws of this State, for the purposes of internal improvement, and to persons for building vessels, under the provisions of the act of February the third, 1854, entitled: 'An act to encourage the building of steamboats, steamship and other vessels in the State of Texas,' and certificates for unlocated balances heretofore issued, and pre-emption certificates, shall be presented to said commissioner of claims for registry, within two years from and after the first day of September, one thousand eight hundred and fifty-six, or they shall be forever barred from location, survey and patent. And any such certificates which have been entered, located, or surveyed and filed in any district surveyor's office, or returned to the general land office, may be withdrawn from said office for the purpose of being presented to said commissioner of claims, without, in any manner, affecting or vitiating said entry location, or survey."

I have reproduced the above section in full, because the punctuation of it seems to make the first exception somewhat obscure. The use of a comma between the word "class" at the end of the second line and the word "which" at the beginning of the third line makes the following clause parenthetical, although it was plainly intended to be re-

strictive; and that it ought to be so read is made perfectly manifest by section 3. Reading it in that way, and omitting all of the exceptions as immaterial in this connection, that section declares that:

"All land certificates of every description * * * shall be presented to said commissioner of claims for registry within two years from and after the first day of September, 1856, or they shall be forever barred from location, survey and patent."

On January 16, 1858, Congress passed what it called "An act supplementary to and amendatory of the act of August 1, 1856," providing that the legislature, by a joint vote, should elect another commissioner of claims, who should hold his office until the first of September, 1859, after which date the Comptroller should perform the duties devolved upon the commissioner of claims by it, and by the act of August 1, 1856. The fourteenth section of that supplementary act was:

"14. That all claims for land for military services not presented to the commissioner of claims on or before the first day of September, 1858, shall also be forever barred; but when any claim for land, military or otherwise, is presented on or before that day, proof to establish the same may be subsequently taken, until the first day of January, 1859, and not thereafter."

I suppose that counsel for petitioners will readily admit that under this fourteenth section, which I have just quoted, "all claims for land for military services" which had not been presented to a commissioner of claims on or before September 1, 1858, were "forever barred;" and as General Houston did not avail himself of either the original or the supplementary act, his certificate was proscribed by both.

For a fourth time, Texas invited all who had unsatisfied claims upon her justice or her generosity to establish them,

under the act of February 7, 1860, the ninth section of which reads as follows:

"9. All bounty and donation warrants issued for military services that have not been patented or approved by a former commissioner of claims, except those issued by a commissioner of claims, or the comptroller acting as such, shall be presented to said commissioner for approval, on or before the 1st day of June, 1861, or the same shall be forever barred."

If the above section had been drawn for the special benefit of General Houston, it could not have applied more exactly to his certificate. It was a "bounty warrant, issued for military services," and it had not been patented or approved by a former commissioner of claims, or issued by a commissioner of claims, or by the comptroller acting as such. It was, therefore, the precise character of a certificate which that section said should be presented to the commissioner of claims for approval on or before the first day of January, 1861, or be forever barred. But again General Houston failed to take advantage of the opportunity offered, and as he did not present his certificate for approval, a perpetual bar was again denounced against it.

What was the legal status of this Houston warrant after the time-limit of the last act expired on the first day of January, 1861? Outlawed by four successive and valid legislative enactments, it did not constitute an obligation of the State when the constitution of 1870 became effective; and the special act of July 22, 1870, clearly recognised that condition, for otherwise that act would have been wholly unnecessary.

The petitioners do not seem to think it important for us to determine, or even to consider, the status of the Houston warrant when the constitution of 1870 was adopted, but I ascribe their mistaken attitude in that regard to the opinion, as expressed in their brief, that while other classes of certificates have been subjected to various requirements by dif-

ferent laws, "no legislation has ever required any review or further sanction of warrants, issued by the Secretary of War for bounty lands for military service." With that impression on their minds, perhaps it should not surprise us that, beginning with June 20, 1838, when the Houston certificate was first issued, they ignore everything which was done or said prior to July 22, 1870, and claim that the title to the land in litigation here passed to their predecessors in interest by virtue of the special act approved on that day. Even if I could join them in pretermittting all attention to the several acts which, in my judgment, must essentially influence the decision in this case, I still could not agree with them as to when the title passed, because:

III.

The act of July 27, 1870, was repugnant to the constitution then in force, and did not, therefore, divest the State's title.

The Supreme Court of Texas has repeatedly held that a patent issued under a void special act is a mere nullity, and leaves the title, equitable as well as legal, still in the State. With that much admitted, it follows, as a matter of course, that if the special act under which the petitioners claim was void, it could not have conveyed title to anybody. Was the special act of July 22, 1870, unconstitutional and void? That question is answered affirmatively and conclusively by the Supreme Court of Texas in *Bacon and Bates vs. Russell*, *Holmes vs. Anderson*, and *White vs. Martin*.

Bacon and Bates vs. Russell, 57 Tex., 400, involved a tract of land patented under a bounty land warrant issued for military services, according to a special act of the legislature, approved February 19, 1873, and the court said:

"The constitution in force when the act of February 19, 1873, was passed, provided that 'the Legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold

at the Land Office, except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres.' Const. 1870, Art. X, sec. 6.

"This section of the constitution evidently prohibited not only the direct grant of land, but it prohibited every step which could ultimate in a grant of land to other than an actual settler, and to such limited the grant to one hundred and sixty acres."

Conforming to the logic of its opinion, the court held that the special act of the legislature approved February 19, 1873, authorizing the Commissioner of the General Land Office to issue a certificate for 640 acres of land to William J. Russell "for his participation in the campaign against Bexar in 1835," was repugnant to the constitution in force when the act was passed; and as that same constitution was in force on July 22, 1870, the legislature had no more power to pass the special act of that date than it had to pass the special act of February 19, 1873, which was held void in *Bacon and Bates vs. Russell*.

In *Holmes vs. Anderson*, 59 Texas, 481, the question arose over a headright certificate issued under a special act of the legislature approved May 26, 1873; and after conceding that "if, at the time of the adoption of the constitution of 1870, there existed a valid and unsatisfied certificate to Willett Holmes for a league and labor of land, and it had been lost,
* * * the legislature had power to direct a new certificate to issue to evidence such right," the court said:

"If, however, there was no valid unsatisfied certificate in favor of Willett Holmes for a league and labor of land in existence potentially, although the evidence of it may have been lost or destroyed, at the time the constitution of 1870 was adopted, then the legislature had no power to grant to Willett Holmes a land certificate for a league and labor of land as a headright, although at some past time the facts may have existed which would have entitled him to a certificate for that quantity of land. Constitution 1870, art. X, section 6; *Bacon and Bates vs. Russell*, 57 Texas, 415."

In *White vs. Martin*, 66 Texas, 340, the legislature had, by a special act approved April 26, 1873, directed "the Commissioner of the General Land Office to issue to Absalom P. Joyce, 640 acres headright, in lieu of No. 162 issued in Shelby County, without the conditional." In 1858 the original certificate was presented to the Court of Claims, which refused to approve it; and the Supreme Court of Texas following *Bacon and Bates vs. Russell*, and *Holmes vs. Anderson*, held that the legislature had no power to pass the special act.

The petitioners in their brief have endeavored to distinguish the act of July 22, 1870, from the act of February 19, 1873, upon the ground that the one endeavored to create a new right, while the other sought to revive an old right. That same argument was made in *Bacon and Bates vs. Russell*, but the court rejected it, saying:

"The right having ceased, and the constitution having declared that the grant should not be made, the legislature was powerless to revive the right which had once existed but had been lost by the failure of the party to apply for and receive the same."

In that case the legislature authorized the issuance of a certificate on which a patent might be obtained, while in this case the legislature sought to vitalize a barred certificate on which it directed that a patent should issue; but the legislature had no more right to do the one than it had to do the other, for the court declared, in that very opinion, that the State had the same undoubted right "to prescribe a bar for even issued certificates" as it had to prescribe a bar against the issuance of certificates.

The same argument was repeated, and again rejected, in *Holmes vs. Anderson*, where the court said:

"After the adoption of the constitution of 1870, so long as it continued in force, the legislature had no power to authorize the original issue of such land

certificates as issued to Willett Holmes by reason of any equity or right which he, at some former time, may have had.

"From time to time the legislature had furnished ample means to such persons as were entitled to receive land certificates of any of the different classes by which they could obtain them, and even the act of February 7, 1860, applied to the original issue of headrights of the first class; and against all who failed to avail themselves of the offered opportunities the constitution of 1870 operated as a bar to the further extension of time or means by the legislature."

In *Sherman vs. Pickering*, cited by the petitioners on another branch of this case, the court said distinctly that under the constitution of 1870 the legislature could not "waive the bar of limitation and permit the reinstatement of the original claim." The act of July 22, 1870, was so clearly unconstitutional that it would be a waste of time to prolong the argument, or to continue an examination of the cases concerning it. But

IV.

As the constitution of 1876 did not contain the particular provision found in the constitution of 1870, under which the special acts were held void, the legislature of Texas possessed the power to pass the act of March 31, 1883, and limitation did not begin to run against the owners whose titles were perfected by it until the date of its approval.

As the validity of the act of March 31, 1883, has been sustained, *Blum vs. Looney*, 60 Tex., 1, 3, and is not questioned here, the first part of the foregoing proposition may be received as self-evident; and it only remains for us to inquire whether the second part states the law correctly. That limitation did not begin to run against the owners whose titles were perfected by the act of 1883 was expressly adjudicated by the Supreme Court of Texas in *Bates vs. Bacon*, where it

was held that the titles which the void acts attempted to convey, remained in the State until the act of March 31, 1883, and that, therefore, limitation could only run from and after the date on which that act was approved.

It has been suggested that the law of 1883, if read according to its strict letter, may not include the act for the relief of the Houston heirs; but no court would be justified in adopting that narrow construction of it, and I have no fear that this court will do so. The plain purpose of that act was that those to whom former legislatures had made special grants should have the land which those legislatures intended to give them; and surely the heirs of General Houston should not be excluded, for upon them, above all others, the legislature of Texas would have been most anxious to bestow its benefaction. I do not, however, concede that the act for the relief of the Houston heirs is not within the very letter of the law of 1883, because it was the full equivalent of a direction to issue a new certificate. But it is not incumbent on me to elaborate this question, because the petitioners concur in my view of it, and I may well adopt their argument as it appears on pages 67 and 68 of their brief.

If I have established the propositions that the act of July 22, 1870, was void, and that the act of March 31, 1883, was valid, it results, necessarily, that limitation did not begin to run against the Houston heirs until the latter act was approved. That being true, the bar was not complete when the act of 1891 was passed, and therefore

V.

The petitioners could not have acquired title under the ten years statute of limitation, because the land in controversy is within an enclosure which contains more than five thousand acres, and in such cases, since 1891, that statute does not apply.

In the late seventies it became apparent to the more sagacious stockmen of Texas that they could not depend much

longer on the open range to carry their cattle, and they began to purchase land for ranch purposes. Most of them bought the lands which they had been using, but it frequently happened that they were not able to buy in solid bodies. In some instances the owner did not care to sell and in other instances the land belonged to unknown heirs, living in other States. That was not, however, a very serious inconvenience until they began to fence their pastures, and then a grave difficulty confronted them. In that day land was very cheap and fencing was relatively very expensive. It was not practical, therefore, to fence a large body of land in such a way as to exclude from the enclosure the small tracts, which in many instances were completely surrounded by the purchased lands, and the fences were run without taking into account the smaller tracts, which the large owners understood perfectly well they did not own, and to which they did not at that time make any claim. But when some of the small owners came to take possession of their lands, and were not willing to sell, their title was denied and the statute of limitation was invoked. To remedy that injustice the legislature of Texas, in 1891, passed an act, now Article 5758 of the Revised Statutes, which is as follows:

"Possession of land belonging to another by a person owning or claiming five thousand acres or more of land enclosed by a fence in connection therewith, or adjoining thereto, shall not be the peaceable and adverse possession contemplated by Article 5675, unless said land so belonging to another shall be segregated and separated by a substantial fence from said lands connected therewith or thereto adjoining, or unless at least one-tenth thereof shall be cultivated and used for agricultural purposes, or used for manufacturing purposes, or unless there be actual possession thereof."

It is admitted that the land in controversy is situated in an enclosure containing more than five thousand acres; that it is not segregated and separated by a substantial fence from the other lands connected with it; and that one-tenth of it

has not been cultivated or used for agricultural or manufacturing purposes. Petitioners' counsel do not, however, admit that there has been no "actual possession" of this land; but I think the proof abundantly shows that there has not been such as that law contemplates.

Obviously the actual possession mentioned in that statute must mean something different from a possession by virtue of the larger enclosure; because otherwise the last clause would render the preceding ones absolutely meaningless. Before the act of 1891 was passed actual possession was a necessary element, but possession through an enclosure, without regard to the size of it, was deemed actual in a sense to satisfy the statute; and the very purpose which the legislature had in mind when passing the act of 1891 was to require something more than the existing law required. It would be grossly absurd to say that after providing that a plea of the ten years statute could not be successfully interposed where the land was situated in an enclosure containing more than 5,000 acres, unless the particular land in litigation was separated from the land connected with or adjoining it by a substantial fence, or was in cultivation, or was used for agricultural or manufacturing purposes, the legislature then intended to render those clauses wholly nugatory by inserting another clause which left the law exactly as it stood before the amendment. Reading the act of 1891 as a whole, and remembering the evils which it was intended to remedy, actual possession, as there used, means a possession apart from the mere fact of its inclusion in a larger enclosure, and requires such a distinct and separate possession as that implied in the other clauses. This view of the act is indicated in *Dunn vs. Taylor*, 102 Texas, 80, 89, where the Supreme Court says:

"The same possession and claim held sufficient for five years is made ineffectual for ten years. Speculation as to the reasons for this would be useless. We must take the statute as it is written, and hold that it does not admit such a construction as the instruction in question put upon it."

VI.

The four daughters of General Houston were all married when the Act of 1883 was passed, and as the bar of the ten years statute was not complete against either of them when the Act of 1891 was passed their title could not have been acquired under the ten years statute of limitation.

A bare statement from the record sustains this proposition, for it shows that Nannie Elizabeth Houston, the second child of General Houston was born September 6, 1846, was married August 1, 1866, to J. C. S. Morrow, and both were living when this case was tried below; Margaret Lee Houston, the third child of General Houston, was born October 13, 1848, and was married on October 17, 1866, to W. L. Williams, who died March 1, 1889, and Mrs. Williams died March 12, 1896, leaving five children; Mary Willie Houston, the fourth child of General Houston, was born April 9, 1850, was married on April 11, 1871, to J. S. Morrow, who died May 20, 1885, and Mrs. Morrow was living at the time of the trial; Nettie Powers Houston, the fifth child of General Houston, was born January 20, 1852, was married on February 20, 1877, to W. L. Bringham, who died February 18, 1913, and she is still living.

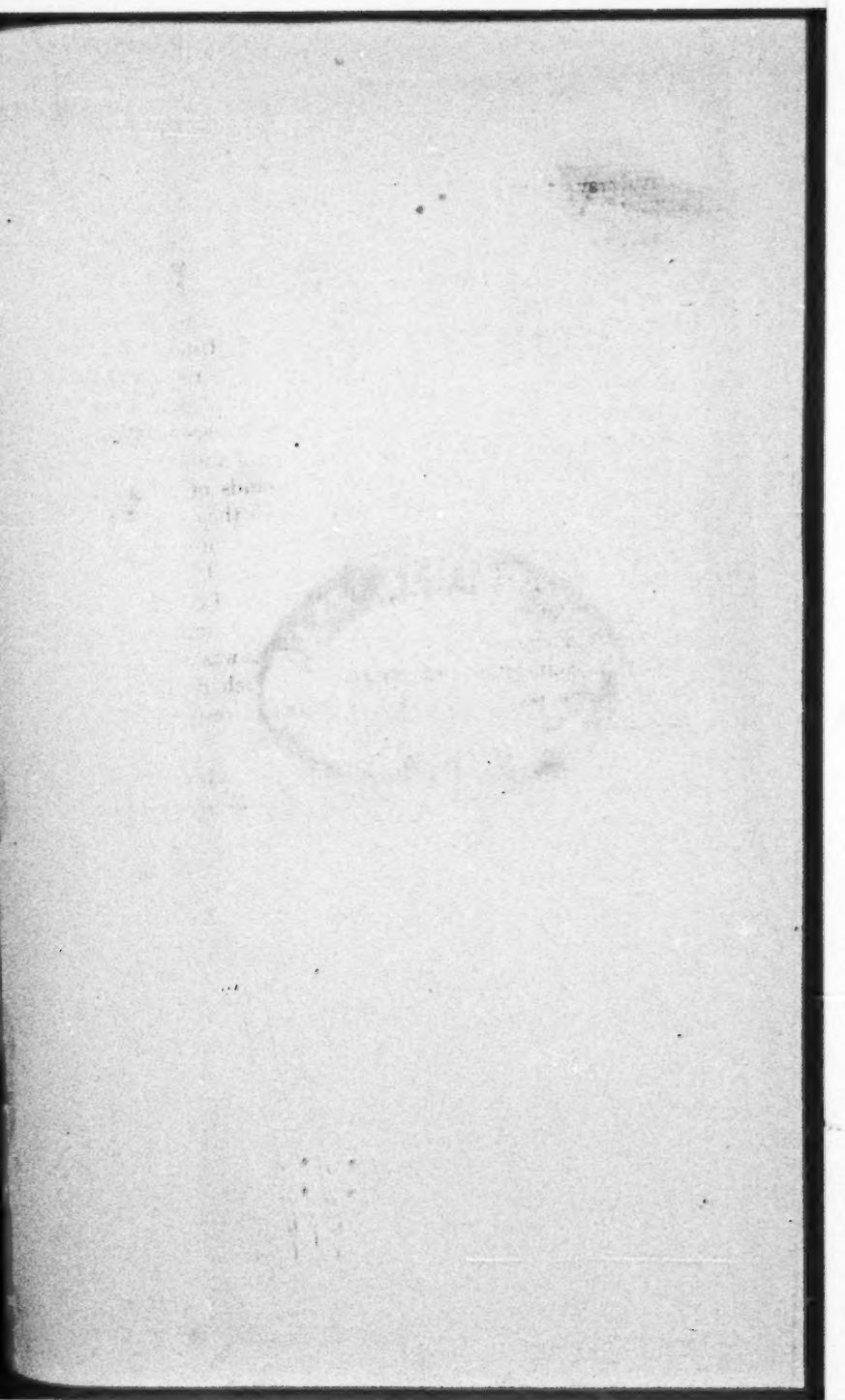
VII.

The petitioners do not hold such exclusive possession of the land in controversy as to satisfy either the five years or the ten years statute of limitation.

As this question has already been argued exhaustively by Mr. Gordon in his brief for the respondent, I will not repeat what he has said, further than to say that the record shows—and the fact is not disputed—that the town of Taft is situated in the same enclosure with the land in con-

trover; that a public wagon road crosses that enclosure; and a railroad runs through it. All who will may come and go as a matter of right on the public wagon road; and all who will may come and go as a matter of right on the railroad, stopping at the town of Taft, or going through, as their interest or inclination may prompt. Under these conditions, it is unreasonable almost to the point of absurdity for the petitioners to claim an exclusive possession of the enclosure. How can it be possible for any person to have an exclusive possession of a pasture in which hundreds of other people live, and through which thousands of other people have a lawful right to travel, or in which they may lawfully remain? It was this circumstance which induced the trial judge in this case to think, as the court had before said in *Polk vs. The Beaumont Pasture Company*, 64 S. W., 58, that while a watercourse might, under some circumstances, be a sufficient enclosure under the statute, it was not so when taken in connection with other facts which denote a want of exclusive possession. All of which is respectfully submitted by

JOSEPH W. BAILEY,
Attorney for the Respondent.



**ALICE STATE BANK ET AL. v. HOUSTON
PASTURE COMPANY.**

**CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FIFTH CIRCUIT.**

No. 154. Argued January 24, 1915.—Decided June 3, 1915.

Upon a review by certiorari, the court confines its discussion to the matter relied on in procuring the writ.

An enclosure bounded on three sides by a fence and on the fourth by deep water (Nueces Bay) will sustain a claim of adverse possession under Rev. Stat., Texas, Art. 5674, if the other elements—claim under registered deeds, payment of taxes, pasturing of cattle and exclusion of others—are also present.

227 Fed. Rep. 1015, reversed.

THE case is stated in the opinion.

Mr. Henry W. Taft and Mr. Walter P. Napier, with whom Mr. John G. Boston was on the brief, for petitioners.

Mr. Joseph W. Bailey, with whom *Mr. William D. Gordon* and *Mr. Thomas J. Baten* were on the briefs, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to recover 1280 acres of land in San Patricio County, Texas. There was a trial by jury in which the Court directed a verdict for the plaintiff as to all but certain excepted portions not in controversy here. Exceptions were saved by the defendants, the petitioners, to their not being allowed to go to the jury on the question whether they had a good defense under the Texas statutes of limitation, but they were overruled and the judgment was affirmed by the Circuit Court of Appeals. A petition for certiorari was allowed on the suggestion that there was a manifest conflict between the ruling and the decision of the state court.

An Act of July 22, 1870, declared that a land certificate for 1280 acres theretofore issued to General Sam Houston for military services was a "just claim from its original date" and authorized the issue of a "patent on the same, in the name of the heirs of General Sam Houston, deceased." General Houston's will gave discretionary power to his executors to make such disposition of his personal and real estate as might seem to them best for the interests of his family. On July 22, 1871, Houston's surviving executor made an instrument purporting to convey the above mentioned land warrant and the interest of Houston's estate and heirs to Coleman, Mathis and Fulton. On December 30, 1872, the warrant was located on land already occupied by those grantees, and the executor's conveyance to them was recorded on July 17, 1873. The defendants held deeds under the successors of Coleman, Mathis and Fulton. A patent was issued "to the heirs of Sam Houston, deceased," on June

22, 1874. The plaintiff derived its title from these heirs under deeds executed in 1914.

A plausible argument can be made that the working of the Act of 1870 and other pertinent facts and statutes which we do not recite was to give to the land warrant the validity and effect that it would have had if lawfully executed in General Houston's life. But as that is not the ground upon which the writ of certiorari was asked or granted we confine our discussion to the matter relied upon in asking the intervention of this Court. *Hubbard v. Tod*, 171 U. S. 474, 494. The defendants alleged that if the deeds did not give them a good title, still they had held peaceable and adverse possession of the land, using and enjoying the same, paying taxes thereon, and claiming under deeds duly registered, for more than five years, and therefore that this suit was too late under Rev. State. Texas, Art. 5674. They contended that the fact appeared as matter of law, and also that at least the jury might find for them and sufficiently saved the question as against the view taken by the Court below.

There was evidence that the land in question was part of a large pasture fenced on the north along the Chiltipin Creek and on the east and west by fences running from the creek to deep water in Nueces Bay. There was evidence also that the defendants or their predecessors had paid the taxes, had pastured their cattle there, and excluded those of others, and that they claimed under duly registered deeds. The ground on which the Court ruled as it did and refused requests of the petitioners was stated by it to be that the water front on Nueces Bay was not "such a barrier as would put in motion the statutes of limitation." This ruling was in deference to *Hyde v. McFaddin*, 140 Fed. Rep. 433, (442). But that case was decided on peculiar circumstances, and we do not think an extensive citation from the Texas decisions necessary to show that when the other elements of ad-

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Syllabus.

verse occupation are present, deep water upon one side of a parallelogram is as good a barrier as a fence. Evidently that is the law in Texas as well as elsewhere, and an enclosure by fences and the Nueces River has been said to sustain the defence of the statute as well as fences all around. *Dunn v. Taylor*, 107 S. W. Rep. 952; 956; 102 Texas, 80, 87. The arguments of the respondent on this point at the most do no more than offer considerations of fact that possibly it might be entitled to present to the jury when the case next is tried.

Judgment reversed.